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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Does the Tax Injunction Act, 28 U.S.C. § 1341, deprive federal district courts of jurisdiction to enjoin enforcement of a provision of a New York State tax law when the effect of the injunction would be to terminate the assessment, levy, and collection of the tax?

2. Did the Energy Policy and Conservation Act of 1975 and the revocation, pursuant to its terms, by the Department of Energy of regulations that had set maximum allowable prices for certain petroleum products, prohibit the states from fixing the economic burden of a tax imposed upon companies that sell petroleum products?

3. Did those federal regulations, when they were effective, prevent the states from exercising such a power?

PARTIES TO THE PROCEEDINGS BELOW

All of the parties appearing in the Temporary Emergency Court of Appeals are listed in the caption.

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DECISIONS OF THE COURTS BELOW

The decision of the Temporary Emergency Court of Appeals, dated June 10, 1981, is reported at [Current Binder] *Energy Management* (CCH) ¶ 9772 and is reprinted in the Appendix ("Apdx.") at pages 1a-10a. The decision of the United States Court of Appeals for the Second Circuit, dated January 28, 1981, is reported at 639 F.2d 912 and at [Current Binder] *Energy Management* (CCH) ¶ 9765, and is reprinted at Apdx. 16a-27a. The decision of the United States District Court for the Northern District of New York, dated September 19, 1980, is reported at 499 F. Supp. 888 and is reprinted at Apdx. 28a-66a.

JURISDICTIONAL BASIS OF THIS APPEAL

Appellees assert that the federal courts have jurisdiction over these actions pursuant to §§ 210(a) and 211(a) of the Economic Stabilization Act ("ESA"), 12 U.S.C. § 1904 note, and 28 U.S.C. §§ 1331, 1337, 2201 and 2202. This appeal is from a final judgment entered on June 15, 1981 pursuant to the decision of the Temporary Emergency Court of Appeals ("TECA"). A notice of appeal was filed with the Clerk of that court on June 30, 1981.

TECA held that a state statute, on the validity of which appellants rely, is invalid as repugnant to the Constitution and laws of the United States. We believe that this Court therefore has jurisdiction of this appeal by virtue of 28 U.S.C. § 1254(2).

Appellees have indicated, in opposing a stay of the TECA judgment, that they will contest § 1254(2) jurisdiction. They contend that § 1254(2) does not apply to decisions by TECA because § 211(g) of ESA, the statute establishing TECA, provides for *certiorari* in "any" TECA case and does not mention appeal. We believe jurisdiction by appeal nevertheless exists. Section § 1254(1) of 28 U.S.C. similarly provides for *certiorari* in "any" case in the "courts of appeals"; obviously, that does

not diminish the fact that in some cases—such as this one—an appeal may also be taken from the "courts of appeals" under § 1254(2). Nothing in § 211(g) of ESA or in its legislative history suggests that, by providing specific rules for the review of TECA decisions by *certiorari*, § 211(g) intended to foreclose the ordinary right Supreme Court review of a federal decision holding a state statute unconstitutional. On the contrary, the legislative history suggests that in § 211(g) Congress intended merely to expedite the review process. S. Rep. No. 507, 92d Cong., 1st Sess., *reprinted in* [1971] *U.S. Code Cong. & Ad. News* 2283, 2294.

With one narrow exception not here relevant, TECA has the same functions and powers as the other courts of appeals. ESA § 211(b)(1); *Quincy Oil Inc.* v. *FEA*, 620 F.2d 890, 893 (Temp. Emer. 1980). It is logical to conclude that Congress intended that, except to the extent it provided otherwise, the provisions for Supreme Court review would apply to TECA decisions in the same manner as to decisions of the other courts of appeals.

Section 1254(2) embodies Congress's conviction that, because the most sensitive problems of federalism are raised whenever a federal court strikes down a state statute, the statute should not finally be denied effect without review by the Supreme Court. The original draft of the Judges' Bill of 1925, restricting the previously broad appellate jurisdiction of the Supreme Court, aroused opposition because it did not provide for mandatory Supreme Court review of federal decisions holding state statutes unconstitutional. Senator Claude A. Swanson of Virginia suggested "that we possibly can get this bill through" if it would provide, *inter alia*, for an appeal as of right from decisions holding state laws invalid as against federal law. It should be "imperative," he said, that a state law could not be "nullified except by the Supreme Court." This was because "the best work the Supreme Court can do is in connection with far-reaching questions like that which go to the very structure of our Government and ought to be passed on by the Supreme Court." 66 Cong. Rec. 2757 (1925). As a result, the bill was amended to include a clause substantially the same as the current § 1254(2).

In deference to the policy behind § 1254(2), this Court accords special respect to those cases in which a federal court of appeals has declared the statute of a sovereign state unconstitutional, thus raising sensitive issues of federal-state relations. A case coming within § 1254(2) may not be dismissed for failure to present "a substantial federal question," Sup. Ct. Rule 16.1(b); when a federal court of appeals has declared a state statute unconstitutional, a substantial federal question is presented *ipso facto*.

Plainly, the policy behind § 1254(2) is equally applicable whether the decision against the state law is made by TECA—which is of course denominated a "Court of Appeals"—or by one of the circuit courts of appeals.* There is, therefore, no policy reason why § 1254(2) should not be held applicable to TECA decisions. Nor is there any practical reason. This case does not raise the concern that has sometimes led to narrow construction of the Court's appellate jurisdiction, *see, e.g., Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 & n.16 (1974)—the prospect that a holding of jurisdiction would open the floodgates to numerous appeals of a similar nature. On the contrary, this is, so far as we are aware, the only case in which TECA has ever held a state statute unconstitutional.**

Even if § 1254(2) be held technically inapplicable, the policy that a state statute should not be finally nullified without Supreme Court review still has force. If the Court holds that this appeal is improvidently taken, and acts on this jurisdictional statement as a petition for *certiorari* pursuant to 28 U.S.C. § 2103 and ESA § 211(g), that policy is a compelling factor calling for grant of the writ.

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* Indeed, the policy has had broader application. For example, until the old circuit courts were abolished in 1911, their decisions holding state statutes unconstitutional were appealable as of right to the Supreme Court. *See* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 41, 1539-41 (2d ed. 1973).

** This is probably because the provisions of ESA §§ 210 and 211 relating to exclusive federal jurisdiction over certain cases do not apply to actions claiming the invalidity of state laws. *See* Part II.B *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This appeal raises questions concerning (a) the jurisdiction of the federal district courts over these actions under the Tax Injunction Act, 28 U.S.C. § 1341, and the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, and (b) the validity of a portion of New York Tax Law § 182 under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, and federal statutes,* regulations,** and orders related to the regulation and deregulation of prices for petroleum products. The text of these authorities, insofar as presently pertinent, is set out in the Appendix.

STATEMENT OF THE CASE

The plaintiff-appellees are ten oil refiners, who seek on various grounds to enjoin the defendant-appellants, New York State officials ("the State"), from enforcing a provision of a New York gross receipt tax that bars appellees from passing through the cost of the tax to their New York customers (the "passthrough prohibition"). New York's Legislature has decided that this provision is an essential element of the tax statute. If the passthrough prohibition becomes ineffective, therefore, the statute provides that the tax will cease to accrue.

TECA, affirming the District Court, held that the passthrough prohibition is preempted by the Emergency Petroleum Allocation Act (EPAA), as amended, by regulations promulgated thereunder, *and* by the revocation of those regulations. TECA indicated that this preemption would last until September 30, 1981, when EPAA expires. This preemption

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* Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, *as amended by* the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 15 U.S.C. § 751, *et seq.*

** Petroleum Price Regulations, 10 C.F.R. § 212.83.

holding, which affects a tax deemed essential to New York's vital interests, has plunged New York's financing into disarray and raised highly sensitive questions of federal-state relations.

STATEMENT OF FACTS

A. The New York Tax

In June 1980, New York State, o meet pressing revenue needs of its public transportation systems, imposed on certain oil companies a tax of 2% of that portion of their gross revenues allocable to New York. N.Y.L. 1980, chs. 271, 272, *reprinted in* Apdx. 81a-102a. The Legislature considered the oil companies to be an appropriate source of additional revenue because they had recently benefited to an extraordinary degree from an unusual international commercial situation, rather than from their own skill, management and efficiency. L. 1980, ch. 272, § 1, Apdx. 96a. Desiring that the tax in fact be borne by the oil companies, its intended objects, rather than by consumers, the Legislature expressly provided that the tax was a liability of the companies and prohibited the companies from passing on the cost of the tax in the prices of their products sold in New York.* N.Y. Tax L. § 182(12)(a), *as added by* L. 1980, ch. 271, § 3, Apdx. 88a-89a. So vital was this passthrough prohibition to the tax policy of the State that the Legislature provided that, if an injunction against enforcement of the prohibition were to become effective, the tax itself would cease to have effect ten days later; tax liability accruing up to that time, however, would be left undisturbed. L. 1980, ch. 271, §§ 12(a), (b), (d) *as added by* L. 1980, ch. 272, § 5, Apdx. 99a-100a.

B. Federal Regulation and Deregulation of Petroleum Prices

From 1973 to 1981, the federal government made an extraordinary temporary intervention into the field of petroleum pricing. Neither in entering the field nor in leaving it did the

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* The Act does not otherwise purport to affect the pricing of petroleum products.

federal government indicate that it intended to eradicate pre-existing state powers, especially the power to determine who should bear the burden of a state tax.

1. EPAA—The 1973 Act

EPAA was passed in 1973 in response to the grave petroleum shortages and unreasonably high price levels caused by the Arab oil embargo that grew out of the Yom Kippur War. EPAA § 2, 15 U.S.C. § 751(a). Congress directed the President or his delegate—now the Secretary of Energy—to promulgate a regulation concerning the allocation and pricing of petroleum products. EPAA § 4, 15 U.S.C. § 753.

Among the objectives that the regulation was to seek was the establishment of "equitable prices." EPAA § 4(b)(1)(F), 15 U.S.C. § 753 (b)(1)(F). That is, it was intended "to prevent price gouging [, . . .] which might otherwise occur on the basis of current shortages." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] *U.S. Code Cong. & Ad. News,* 2688, 2702.

EPAA itself, however, has no operative impact on petroleum prices. Rather, it merely sets forth various policy objectives, such as the establishment of "equitable prices," and then gives the President or his delegate "broad regulatory discretion" to formulate rules for the achievement of those objectives. *Consumer Union of the United States, Inc.* v. *Sawhill,* 525 F.2d 1068, 1077 (Temp. Emer. 1975). "[T]he Congressional intent was to hew a sphere of responsibility within which [the President's delegate] could decide how to proceed against the crisis." *Id.* The House Commerce Committee placed special emphasis on this point.

> *First,* the Committee has not attempted to fashion a mandatory allocation provision of its own conception . . . . Administrative flexibility is a prerequisite and, consequently, the Committee has decided to recommend that the Executive be assigned the responsibility for crafting the program pursuant to Congressionally defined (though generally stated) objectives.

H.R. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] *U.S. Code Cong. & Ad. News* 2582, 2589 (emphasis in original).

In enacting this emergency legislation, Congress made clear that it was granting the President only "specific temporary authority" to regulate, EPAA § 2(b), 15 U.S.C. § 751(b), and that it intended to deprive the states of their pre-existing powers only when state actions were "in conflict with" the *regulation* issued under § 4. The statute itself did not have any declared preemptive effect. EPPA 6(b), 15 U.S.C § 755(b). In enacting a very narrow preemptive standard, *contrast* Natural Gas Policy Act of 1978, § 205(d), 15 U.S.C § 3345(d), Congress left unaffected state programs that did not create such a conflict.

Thus, neither EPAA itself nor its policies suggest any rule with respect to the validity of state laws that may have an impact on petroleum prices. Because Congress gave the President and his delegate "the responsibility for crafting the [federal regulatory] program," and provided for preemption only when state action conflicted with the regulation to be adopted, the President and his delegate were given the power either to preempt or to preserve any such state law. Neither result can be considered contrary to the act itself or to its policies. The question is whether New York's law conflicts with the regulation.

The price regulation that was adopted for refiners, a classification including all the plaintiffs in these actions, was set forth in 10 C.F.R. § 212.83. This regulation established "maximum allowable prices" that refiners were *prohibited* from exceeding for certain petroleum products. Nothing in the regulation gave the refiners a *right* to charge their customers the ceiling price if doing so was in violation of state law. Nothing in the regulation suggested that it intended to override states' powers to determine the incidence of its own taxes.

Had the federal regulators so intended, it would have been a simple enough matter to include one extra sentence in the regulations, saying in substance, "Notwithstanding any state or

local law or regulation, a refiner may charge any class of purchasers a price for a covered product equal to the maximum allowable price." No such provision was included.

2. EPCA—The 1975 Amendments

In 1975 Congress reviewed federal energy policy and amended EPAA in the Energy Policy and Conservation Act ("EPCA"). Finding that, for many petroluem products covered by EPAA, the acute shortages of 1973 no longer existed, Congress established procedures for the President or his delegate to follow if they wished to amend the price regulations to exempt a particular petroleum product. EPCA § 12, 15 U.S.C. § 760a. The preemption provision of EPAA, § 6(b), was left unchanged. In promulgating an amendment, therefore, the administrators could, as before, either preempt or preserve a state law. After issuing an exempting amendment, the President retains standby authority—which has never been exercised—to reinstitute price controls, until September 30, 1981. On that date his authority to establish maximum prices of petroleum products terminates. EPCA § 18, 15 U.S.C. § 760g.

Congress enacted the 1975 amendments to foster a "gradual return" to deregulation of the petroleum industry. H.R. Rep. No. 340, 94th Cong., 1st Sess. 55, *reprinted in* [1975] *U.S. Code Cong. & Ad. News.* 1762, 1817. It wished, that is, to begin restoration of the *status quo ante*—a status that included extensive state powers. Nothing in the statute or its legislative history supports the inference that, by gradually phasing out an extraordinary and temporary exercise of federal power over prices, Congress wished to eradicate pre-existing state authority, especially authority concerning the incidence of a tax. Certainly Congress certainly never said so.*

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* The 1975 deregulation legislation does contain rhetoric extolling the free market system, but not a word was said concerning state powers, let alone preemption of state tax laws. Indeed, the only reference to state powers in either the 1973 or 1975 legislative debates was a statement by Senator Jackson in 1973 urging federal action to prevent the dangers of "piecemeal action by the States." 119 Cong. Rec. 17764 (1973). This concern was reflected in § 6(b) of EPAA, preempting state laws in conflict with the regulations.

3. Federal Deregulation of Petroleum Prices

After passage of EPCA in 1975, the federal government steadily withdrew from the regulation of petroleum prices. Indeed, by the effective date of the New York tax most petroleum products (about 65% of the oil products sold in New York) had already been exempted from federal price regulations. Even with respect to the remaining products, there was at all relevant times a material question of fact as to whether the controls had any impact on the prices charged by appellees for regulated products, for soft demand prevented refiners from charging prices near the federally-allowed maximums.

Finally, on January 28, 1981, the President, by Executive Order, ordered the immediate exemption of all petroleum products from federal price regulations. 46 Fed. Reg. 9909. Except for the President's standby authority, which will expire before the Court's Term begins, the federal Government has, for all practical purposes, withdrawn completely from the field of petroleum price regulation.

PRIOR PROCEEDINGS

These actions, seeking on various grounds a declaration and an injunction against the passthrough prohibition, were brought in July 1980 in the United States District Court for the Northern District of New York. The State moved to dismiss under 28 U.S.C. § 1341 for lack of federal jurisdiction. Section 1341, the Tax Injunction Act, denies federal district courts jurisdiction to enjoin the "assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Because enjoining enforcement of the passthrough prohibition would necessarily prevent collection of the tax itself, these actions are, we believe, barred by § 1341.

The District Court denied defendants' motion to dismiss and granted plaintiffs' motions for summary judgment on preemp-

tion grounds. The judgment has, however, been continuously stayed since its entry, first by the District Court and then by the United States Court of Appeals for the Second Circuit and by TECA.

Because appellate jurisdiction in cases involving certain EPAA-related issues has been held to be bifurcated, the State took appeals both to the Second Circuit and to TECA. Following its usual procedure, TECA postponed its proceedings pending resolution of the Second Circuit appeal. On January 28, 1981, the Second Circuit affirmed the District Court's holding that the federal courts have jurisdiction over these actions.* The Second Circuit held, however, that TECA had appellate jurisdiction over the preemption issue.

The State therefore pursued before TECA its appeal on that issue. On June 15, 1981, TECA affirmed the judgment of the District Court, but stated that the preemption would last only until September 30, 1981, when EPAA expires. The State now appeals from the judgment of TECA. As part of its appeal, the State continues to challenge the existence of federal jurisdiction.

I.

THE PRACTICAL CONSEQUENCES OF THE DECISION BELOW WILL BE SIGNIFICANT AND SEVERE FOR NEW YORK, ITS PUBLIC TRANSPORTATION FACILITIES AND ITS CONSUMERS.

A. If the TECA Decision Is Allowed to Stand, a Large Amount of Tax Liability Will Be Passed Through to New York's Consumers, Contrary to Legislative Intent.

If the TECA decision stands, the oil companies will be allowed to pass through to their customers the large sum of tax liability—estimated to be in excess of $200 million—that has

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* The State petitioned for certiorari from this decision. The Court denied the petition on June 22, 1981. 49 U.S.L.W. 3954 (No. 80-1864).

already accrued. Because virtually all of the oil companies now operating in New York have been subject to the tax, competitive forces should not make it difficult for them to pass through, over a period of years if necessary, at least a significant portion of that liability; indeed, it appears that at least one of the oil companies, New England Petroleum Corp. (NEPCO), has contracts that would, if the statute's bar were lifted, give it a right to pass through its tax costs to its customers.

Accordingly, New York's consumers would be forced to bear the burden of millions of dollars of tax liability, a burden that New York State has carefully and specifically provided should be borne by the oil companies instead. This alone is a crucial effect of the TECA decision and makes it inappropriate for this Court to allow that decision to stand without giving it plenary consideration.

B. The TECA Decision Disrupts the Finances of New York State.

If the TECA decision becomes effective, it would cause extreme disruption for the finances of the State and its public transportation systems. Indeed, the uncertainties caused by the TECA decision have already had a harmful effect.

At least two of the plaintiff oil companies have brought state court actions to nullify all previously-accrued tax liability, based upon the determination in these cases that the passthrough prohibition is preempted. *Mobil Oil Corp.* v. *Tully,* No. 10524-80 (Sup. Ct. Albany Co.) ("Mobil Albany Action"); *New England Petroleum Corp.* v. *State of New York,* No. 2913-81 (Sup. Ct. Albany Co.) ("NEPCO Albany Action"). They have maintained that, as a constitutionally-mandated consequence of that declaration, the previously-accrued tax liability must be nullified, notwithstanding the explicit language of New York's statute to the contrary. In TECA, the other appellees stated that they too may base similar state court claims upon the declaration against the

passthrough prohibition, if that declaration is upheld. *Joint Brief of Plaintiffs-Appellees* at 22 n.17.

Should such claims prevail, they would cause the abrupt cancellation of the approximately $350 million tax liability accrued up to September 30, 1981 (when, according to TECA, the conflict with federal law will no longer exist). Thus, if appellees' contentions prevail, the State would be forced to return the tax money already collected—approximately $175 million at this writing—and forego collecting the remaining $175 million, which is or will become due but which the oil companies have not paid.

Plainly, such a result would have—and the mere possibility of it already has had—a grave impact on the State's finances. It is no answer to argue that the State can devise a new plan to close the operating deficit of its public transportation facilities. Any such plan would require the State to alter its fiscal policy and divert needed revenues from other important uses or raise additional revenues from hardpressed sources. No substitute program can be a satisfactory alternative for the tax that the State has chosen as the most appropriate method of accomplishing its objectives.

Moreover, there is the possibility that the impact of the TECA decision will not be limited to tax liability accruing on or before September 30, 1981. After that decision, the oil companies asserted before TECA that (1) preemption will continue after September 30, 1981, and (2) the New York statute "has already self-destructed" and can be "resurrect[ed]" only by the decision of "a court of final appellate review." *Joint Memorandum in Opposition to Appellants' Motion for a Stay Pending Appeal* at 4 n. & 14-15 n.

The State believes that these contentions are plainly without merit. But the issue should not remain in doubt. It would be unfortunate if the continued validity of New York's tax were to remain suspended in uncertainty because this Court declined to give this case, and all its ramifications, plenary consideration, or if the tax, which is vital to a sovereign State, were to die on the basis of a decision by a lower federal court.

II.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

The crucial underpinning of the decisions of all three lower federal courts, on both the jurisdictional and preemption issues, was that New York's passthrough prohibition is not an exercise of the tax power but rather a price-regulating exercise of the police power. Apdx. 38a-39a (N.D.N.Y.), 26a-27a (2d Cir.), 7a (TECA). Thus, the courts concluded that § 1341, the Tax Injunction Act, does not apply, and that New York's law conflicts with the price-regulating goals of EPAA. If the Court gives this case plenary consideration, we will present the following arguments, which here we can only outline, to challenge the basic premise of the courts below.

—The appropriate question is not what power the State was exercising, but whether New York's passthrough prohibition is a proper and integral element of a tax statute.

—It is a proper element of a tax statute not only to select the immediate taxpayer, *e.g.*, *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 526-27 (1959), but also to allocate the ultimate economic burden—*i.e.*, to provide whether or not the tax may or must be passed on. *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339, 347-48 (1968) ("indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser"); *accord, e.g., United States* v. *Tax Commission of Mississippi*, 421 U.S. 599, 607-08 (1975).

—Such authority is an implied element of the taxing power, for it is necessary to make effective and significant the State's choice of taxpayer, *see McCulloch* v. *Maryland*, 4 Wheat. (17 U.S.) 316, 408 (1819).

—The States have exercised this authority many times in tax statutes. Sometimes, for example, they require a seller to pass through to his purchaser the cost of, or a refund of, a tax imposed on the seller. *E.g.*, 64H Mass. Gen. L. Ann. §§ 2, 3, 23; N.Y. Tax. L. § 1139(a).

—Two appellees have asserted in state court that the passthrough prohibition and the impost of the tax were passed for "a single objective—to have a tax which could not be passed through." *Memorandum in Support of Summary Judgment Motion* in Mobil Albany Action, p. 23; *accord, e.g., Memorandum in Support of Summary Judgment Motion* in NEPCO Albany Action, p. 12 ("the linkage between the tax and the anti-pass-through provision is patent and inescapable"; "part[s] of a single scheme"). These oil companies have thus taken a position in direct conflict with the one for which they have argued in these actions, and which underlies the lower court decisions in their favor. *See* Apdx. 36a ("Defendants describe the tax and the anti-pass through provision as a 'single entity' . . . . Plaintiffs, on the other hand, argue that the anti-pass through provision is a . . . measure separate from the tax itself.")(N.D.N.Y.).

—It would be capricious, as NEPCO has asserted, for the Legislature to attempt to regulate prices by singling out for attention one small cost, its own tax. Because the Legislature may not be presumed to have acted capriciously, its aim was not to regulate prices but to direct the incidence of that tax.

—The passthrough prohibition, as at least one of the oil companies has conceded, has no possible independent operation or meaning apart from the tax itself. NEPCO *Memorandum in Support of Summary Judgment* in Albany Action, p. 12 n.6 ("the anti-pass through provision is a wholly meaningless set of words apart from the tax it prohibits from being passed through") (emphasis deleted).

—New York's passthrough prohibition is not a price control statute enacted under the police power; it does not even occupy the same field as the now-revoked federal price control program. Its only effect is to fix the actual incidence of the gross receipts tax on the taxpayer. It does not set, nor provide any mechanism for setting, price levels for petroleum products. It does not prevent the oil companies from charging the market level for petroleum products, whether that level be 10¢ or $10

per gallon. In these circumstances, language from legislative findings, relied upon by the three lower courts, cannot transform a statute fixing tax incidence into a price-fixing exercise of the police power in conflict with federal price regulations. *See Hughes* v. *Oklahoma,* 441 U.S. 322, 336 (1979) ("practical impact" of statute, rather than legislature's description or characterization, is determinative).

—As NEPCO has pointed out below, New York has in fact resisted the responsibility to regulate petroleum prices, because at the present time it does not have either the experience or the administrative machinery to do so.

Notwithstanding all these considerations, federal jurisdiction has been upheld, and the State's law held invalid, on a view of that law that is contrary to the State's own, as well as to common sense. This Court should recognize New York's passthrough prohibition for what it is: a valid exercise of the State's authority to determine the actual incidence of a tax, and nothing more. But even if the Court regards the passthrough prohibition as an exercise of the police power, we believe for reasons summarized below that there is no federal jurisdiction and that New York's law does not conflict with the federal regulations.

A. The Tax Injunction Act Divests The Federal District Courts Of Jurisdiction Of These Cases.

1. These Actions Fall Within the Scope of the Act Because They Seek in Effect to Restrain the Assessment, Levy and Collection of a State Tax.

As the District Court noted, if the appellees are successful in this litigation, "there is no question but that the gross receipts tax . . . would cease to be in effect" and that the New York tax could not be "assessed, levied or collected." Apdx. 36a. Nevertheless, the District Court and the Second Circuit both held that the jurisdictional bar of § 1341 does not apply to these actions because they merely challenge the anti-

passthrough provision and not the tax itself. Apdx. 38a (N.D.N.Y.), 27a (2d Cir.).*

As we have demonstrated, the passthrough prohibition is an integral element of the tax statute. Because the fall of the prohibition inevitably causes the tax itself to fall prospectively, an injunction against the prohibition is necessarily a restraint against collection of the tax itself. In addition, the companies have maintained in their state court actions that, as a constitutionally-mandated consequence of the lower federal court decisions, *all* liability under the tax statute, retrospective as well as prospective, must be nullified, notwithstanding the explicit language of the statute to the contrary. This action is thus clearly—and doubly—an action seeking to restrain collection of the tax.

If plenary consideration is granted, we shall develop this argument more fully by making the following points:

—The Second Circuit's decision disregards the overriding principles of federalism underlying the Tax Injunction Act. In violation of the letter and spirit of the statute, it thrusts the federal courts into a forbidden role—interfering by injunction with state taxation. *E.g.*, *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976) (§ 1341 "has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations").

—The Second Circuit's decision conflicts with the well-established doctrine developed in other circuits that, where "there is a direct relationship between the enforcement of [a statutory provision] and the amount of taxes collected," § 1341

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* The Second Circuit found significant a statement by appellant Tully in support of a stay motion that the oil companies "do not challenge the imposition of tax" in these actions. But Commissioner Tully, in seeking to rebut appellees' objection that the tax would continue to accrue during the stay, was only reminding the appellees that they did not purport to challenge the tax itself. He was not withdrawing the State's consistent assertion, made from the very outset of this litigation, that these are in effect actions against the tax itself, and no one at the time—including the Second Circuit—so construed his statement.

forbids the federal courts to enjoin the statutory provision. *Mandel* v. *Hutchinson*, 336 F. Supp. 772, 779 (C.D. Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974) (§ 1341 held applicable to residency requirement for state tax exemption). In such a case, "to grant plaintiffs the relief they request . . . would *in effect* be enjoining the collection of [state] taxes." *Czajkowski* v. *Illinois*, 460 F. Supp. 1265, 1272 (N.D. Ill. 1977), *aff'd*, 588 F.2d 839 (7th Cir. 1978) (emphasis added) (§ 1341 held applicable to methods and procedures used for collection of state tax).

2. Appellees Have a "Plain, Speedy and Efficient Remedy" In The Courts of New York State.

Appellees argued in the alternative that § 1341 cannot apply to these actions because the federal district courts are vested with exclusive original jurisdiction over them pursuant to § 211(a) of ESA, which is incorporated to a narrow extent by § 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1). Accordingly, appellees argue, they do not have a "plain, speedy and efficient remedy" in the New York courts.

Because neither the District Court nor the Second Circuit reached this issue, we will not discuss in detail the reasons demonstrating why the state courts are not deprived of jurisdiction over a suit that claims, *inter alia*, preemption of a state law by EPAA. The tenuousness of appellees' argument is demonstrated by the fact that in at least five cases certain of these same oil companies have brought actions in state court challenging state laws as preempted by the same set of regulations that is involved here. Mobil Albany Action; NEPCO Albany Action; *New England Petroleum Corp.* v. *County of Suffolk*, 52 A.D.2d 926, 383 N.Y.S.2d 405 (2d Dept. 1976); *Governor of Maryland* v. *Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978); *Atlantic Richfield Co.* v. *Tribbitt*, 399 A.2d 535 (Del. Ch. 1977). Indeed, two of those actions are among the ones currently pending in New York in which the oil companies have challenged precisely the same tax statute as is involved here. Mobil Albany Action; NEPCO Albany Action. In all five cases, the state courts have accepted jurisdiction.

Moreover, this Court recently decided another case from state court, *Commonwealth Edison Co.* v. *State of Montana*, 49 U.S.L.W. 4957 (U.S. July 2, 1981), in which, as here, a state tax was challenged on numerous grounds, among them preemption by EPAA. *See Commonwealth Edison Co.* v. *State*, 615 P.2d 847, 859 (Mont. 1980). Neither the Montana courts nor this Court doubted the state court's jurisdiction. Nor was there any reason to. Congress never gave any indication that it intended the grant of exclusive jurisdiction, which must be narrowly construed, *cf. City of Baton Rouge* v. *United States Environmental Protection Agency*, 620 F.2d 478, 480 (5th Cir. 1980); *Texaco Inc.* v. *Department of Energy*, 616 F.2d 1193, 1197 (Temp. Emer. 1979), to apply to preemption cases arising under § 6(b) of EPAA.

B. The TECA Decision Gives Inadequate Deference To The Principles Governing Preemption, To The Statutory Preemption Standard, And To The Opinions Of The Department Of Energy, Which Wrote The Regulations Claimed To Be Preemptive.

TECA barely acknowledged, and gave little heed to, the principles that this Court has established for deciding the sensitive question of whether a State law has been superseded. As the Court has held many times,

> federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 142 (1963); *accord, e.g., Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 101 S.Ct. 1124, 1130 (1981). There is to be no preemption, in other words, "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

TECA did not suggest that Congress has, until September 30, 1981, completely foreclosed state legislation that might affect petroleum prices. Rather, TECA held that New York's anti-passthrough provision conflicts with federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). There were several fundamental flaws in the analytical framework used by TECA in applying this test. We outline these errors below, and shall discuss them more fully if plenary consideration is granted.

1. In a preemption case, "the proper approach is to reconcile" the federal and state schemes. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973); only where the conflict is "irreconcilable," *Florida Lime, supra*, 373 U.S. at 146, should state law be overridden. Moreover, the conflict must be "actual" and immediate, not merely distant and hypothetical. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960); *Goldstein* v. *California*, 412 U.S. 546, 554-55 (1973); *Hines, supra*, 312 U.S. at 67 (preemption must be shown in "the circumstances of this particular case").

TECA made no apparent attempt to reconcile the federal and state schemes; it made no attempt, for example, to determine whether the federal statute and regulation could plausibly be construed to tolerate state laws bearing on petroleum prices and to accommodate, rather than override, state laws affecting tax incidence. Nor did it make any apparent effort to determine whether the supposed conflict, with a soon-to-expire federal regulation that had lost all effectiveness, was a matter of reality or only of theory.

2. TECA did not accord any significance to the preemption provision of EPAA, § 6(b), 15 U.S.C. § 755(b). That section, limiting preemption to cases of "conflict with" regulations or orders issued under EPAA, stands in stark contrast to the preemption clauses of other statutes. ERISA, for example, supersedes "any and all state laws insofar as they may now or

hereafter relate to" covered pension plans. 29 U.S.C. § 1144(a). By contrast, § 6(b) makes clear that in EPAA, as in pre-ERISA pension legislation, Congress "envisioned the exercise of state regulation over [the covered subject matter]." *Alessi* v. *Raybestos-Manhattan, Inc.*, 101 S.Ct. 1895, 1906 (1981), *quoting Malone* v. *White Motor Corp.*, 435 U.S. 497, 514 (1978) (plurality opinion).

Congress, in other words, recognized that some state laws bearing on petroleum prices would not be "in conflict with" regulations or orders issued under EPAA and would be preserved. TECA ignored this plain fact. Consistently applied, its opinion would invalidate any state law relating to petroleum prices. The *sub rosa* effect of the TECA decision, then, is to exclude the states from the field completely, even though that was manifestly not Congress' intent.

3. TECA misunderstood another important aspect of § 6(b). In contrast to most other preemption statutes, *e.g.*, 15 U.S.C. § 78bb(a), § 6(b) does not provide for preemption by the substantive terms of the statute itself but only by regulations or orders issued under it. Clearly, this is because, as explained above, the statute itself has no operative impact. The statute merely gives the Executive the responsibility for "crafting the program" in accord with broad policy objectives. But "general expressions of 'national policy' " cannot justify preemption of a state law; that requires "focused allegations concerning alleged conflicts between the state law and specific provisions of [federal law]." *Commonwealth Edison Co.* v. *Montana, supra,* 49 U.S.L.W. at 4964 & n.21. In this case, the only such provisions that could have a preemptive effect are contained in the regulations promulgated by the federal administrators.

It is long-accepted law that, since an act of Congress cannot preempt state law in the absence of a "clearly manifested" intent, an administrative regulation cannot do so "unless, and except so far as, it conforms to a high standard of certainty." *Illinois Central Railroad Co.* v. *State Public Utilities Commis-*

sion of Illinois, 245 U.S. 493, 510 (1918). This is especially so here, where DOE could, if it wished to, demonstrate in one sentence a preemptive intent, *see* pp. 7-8 *supra.* The SEC did this recently, resolving with one stroke of the pen all doubts about its intention to preempt certain state takeover laws. 44 Fed. Reg. 70329-30 (Dec. 6, 1979) (rule makes conflict with state statutes "direct and substantial"); *see, e.g., MITE Corp.* v. *Dixon,* 633 F.2d 486, 499 n.25 (7th Cir. 1980); *AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929, 933-34 n.4 (S.D. Ohio 1979).

4. Not only has DOE not indicated to a "high standard of certainty" an intention to preempt New York's law; in DOE's only statements on the subject, it has made clear that it does not regard its regulations, or their revocation, as having that effect. *See United States* v. *Larionoff,* 431 U.S. 864, 872 (1977) ("ultimate criterion" in construing regulations is administrative interpretation, which is "controlling" unless "plainly" incorrect). DOE expressed its position directly in a letter by Eric J. Fygi, Acting General Counsel of DOE, to Governor Carey of New York on June 10, 1980. Mr. Fygi, writing on behalf of the Secretary, stated that the then-pending legislation "would not, if enacted, conflict either with the Emergency Petroleum Allocation Act or with its implementing regulations." Apdx. 103a.

TECA gave no weight to this letter, because it was in response to an informal request to the Secretary and because it was, as Mr. Fygi conceded, composed with some haste. But this misses the fact that the primary importance of the DOE letter is not as a ruling of law but as a compelling demonstration that DOE did not believe the New York statute would obstruct the program crafted by its regulations and deregulatory amendments. The legal niceties of DOE's analysis are beside the point. What is significant is that DOE, given a clear opportunity to make manifest a preemptive intent, instead responded with alacrity to accommodate the State.

Moreover, the supposed defects of Mr. Fygi's letter do not bear on DOE's other opinion letter—which, astonishingly, was

never even mentioned by either the District Court or TECA. After Connecticut passed a statute controlling the prices of certain petroleum products that had been removed from federal regulation, appellee Mobil wrote to DOE on May 16, 1980, asking DOE to indicate that the statute conflicted with federal law. Apdx. 107a. Six weeks later, on July 1, DOE replied bluntly—and without qualification—through General Counsel Lynn Coleman: "We do not agree with your contention that § 13(b) of the Connecticut Law is preempted . . . ." Apdx. 108a. That the decision was adverse to the interests of the oil companies gives them no cause to complain about the informality of the procedure leading to it; an oil company requested the opinion and was the only party to present its views to DOE.*

If, as DOE has said, the Connecticut law is valid, the validity of New York's law, so far as it relates to deregulated products, follows *a fortiori*, for Connecticut's statute, unlike New York's, is a blatant price regulation. Only by completely disregarding the views of DOE, which formulated the regulations and the deregulating amendments, could one possibly reach the conclusion that New York's statute is preempted.

The principal evidence of preemption relied upon below was statutory rhetoric about the free market system. That rhetoric, however, is ambiguous at best. *See* p. 8n *supra*. While it would support a Congressional enactment barring the states from interfering with the free market, Congress never enacted such a prohibition.

In short, the asserted preemption in this case is the work of neither the Congress nor of the administrative agency. It is a judicial creation, pure and simple, and it has eroded the principles of federalism under which the states may not be ousted from their traditional areas of authority absent a manifest Congressional or administrative intent to do so.

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* Mobil did not bring the Coleman letter to the attention of the District Court for the District of Connecticut, which held the Connecticut law invalid in *Mobil Oil Corp.* v. *Dubno*, 492 F. Supp. 1004 (D. Conn. 1980).

C. New York's Passthrough Prohibition Is Not Preempted By Dormant Federal Authority.

The most significant impact of the TECA decision is its holding that New York's passthrough prohibition is preempted even while federal price regulatory authority lies dormant. TECA based this holding on a perception that the revocation of federal regulations pursuant to EPCA represented a legislative decision that, so long as standby authority existed, petroleum products be free of all laws that may have any effect on price.

This is a startling proposition, one never articulated when the statute was enacted, and one which, if articulated, would have been the subject of the fiercest public debate and controversy. We believe that on plenary consideration we will be able to show that for several reasons this proposition makes little sense:

— The extraordinary, temporary federal regulation of petroleum products was superimposed on a well-established system of state oil production controls, which have remained in effect throughout and remain in place today. In specifically authorizing the revocation of the federal controls in 1975, Congress gave no indication that it intended to eradicate these state controls. As when it authorized the revocation of the World War II price controls, Congress spoke rhetorically of restoring a free market. *See* Pub. L. No. 79-548, 60 Stat. 664 (1946) (seeking "a successful transition to a peacetime economy . . . under a system of free enterprise"). And, as before, this rhetoric meant an end only to temporary federal intervention, not to traditional state powers.

— It makes no sense to believe that, two years after singling out the petroleum industry for extraordinary federal intervention, Congress decided that the industry was working so smoothly that it must again be singled out for an "Adam Smith" exemption against all state legislation bearing on prices. Under TECA's theory, it a state enacted a passthrough prohibition as part of a general sales or gross receipts tax on all industries, oil companies alone would be exempt.

— Congress provided for a "gradual return" to a market free of federal regulation. But under TECA's theory, on September 30, 1981 dormant federal authority will be replaced by active regenerated state power; the petroleum industry would thus be subjected to more regulation than before, not less. The alternative theory, that state power is ousted indefinitely, is even less logical. Under that theory, in the year 2081 the states will be able, barring further Congressional action, to regulate the price of milk or of chambermaids' wages but not of oil, because for several years a century before federal petroleum regulations were in effect.

— Even if—all these considerations notwithstanding—the Federal Government intended to preempt state price regulations, it did not attempt to interfere with the ordinary state power to determine the incidence of a state tax. The federal government has not "addressed and acted upon," *see Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 174 (1978), and has no interest in, the question of who shall bear the burden of a state's taxes. That is the only question "addressed and acted upon" by New York's passthrough prohibition. There is no conflict.

D. The Former Federal Regulations Did Not Preempt New York's Passthrough Prohibition.

Two fundamental misunderstandings infect TECA's holding that the federal price controls, while they were still in effect, preempted New York's anti-passthrough provision.

First, TECA held that "[t]he state tax" interferes with the balance established by the regulations because "sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states." Apdx. 8a. But it was never the purpose of the regulations to ensure that the net income of the oil companies would be evenly distributed across state lines. To the contrary, although refiners were allowed to include certain taxes in the computations leading to determination of the "maximum allowable price," they were specifically

barred from so including income taxes. 10 C.F.R. § 212. 83(c)(2)(iii)(E)(*7*).

TECA's theory would prohibit any tax or regulation—even a safety regulation—that makes one state a more expensive one than others in which to do business. The very vigor with which the oil companies have opposed proposed taxes even *without* passthrough prohibitions, *see, e.g.*, Mobil advertisement in *New York Times*, July 8, 1981, p. A11, demonstrates that such a tax diminishes net income in the taxing state as compared to its neighbors. But plainly the federal regulations did not preempt such taxes.

Second, TECA believed that the oil companies might be able to pass on the cost of New York's tax to purchasers in other states. Apdx. 8a. This factual conclusion has no factual basis on this motion for summary judgment, was vigorously disputed below, and makes no economic sense. The oil companies are presumably already charging their optimal prices in other states. That their prices may be limited in New York will not enable them to charge higher prices in other states, especially since they face competition in those states from companies not subject to the New York tax.

At least two of the oil companies have in effect asserted their agreement with us on this point. Norman Goldberg, Senior Vice President, Marketing, of Amerada Hess, has stated in an affidavit in this litigation that market conditions would cause the company "to lose customers and sales" if it were to attempt to pass through New York's tax outside the state "in any substantial degree." Apdx. 110a. Similarly, in its Albany Action NEPCO has contended that when it must compete "with suppliers who have not been subject to the New York gross receipts tax" it will not be able to pass through the cost of the tax. *Memorandum in Support of Summary Judgment Motion*, pp. 9-10.

If plenary consideration is granted, we will also make the following points:

— The now-revoked federal price regulations merely established a mechanism for determining the "maximum allowable price" that federal law prohibited the refiners from exceeding. In making that computation, refiners could include the cost of certain taxes, arguably including the tax at issue here. But nothing in EPAA, or in the regulations themselves, gave the refiners a *right* to charge the maximum price if that would violate state law. This is the classic case of confusing compliance with a duty with possession of a right. *See generally* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

— Even if the federal regulations did preempt all state price controls, they would not invalidate New York's passthrough prohibition, which is simply a rule determining the incidence of a state tax. The federal price regulations were drafted with the intention of accommodating, not overriding, state decisions with respect to the incidence of state taxes. It was for this reason that the regulations specifically barred passthrough of income taxes, which states intend to be absorbed by the taxpayer. So far as its impact on federal policy is concerned, New York's tax is no different from an ordinary income tax. DOE and its predecessor consistently applied the regulations as they evolved in accord with the federal policy—reflected also in § 1341 and other contexts—of deferring to the states on matters of state tax law. *E.g., State of Hawaii*, 2 DOE ¶ 80,174 at 80,939 (1978) ("especially influenced" by states' intent as to tax incidence).

In sum, the New York passthrough prohibition does not conflict with any policy represented by the now-revoked federal regulations or the soon-to-expire federal statute. The federal judiciary should not preempt the law of a sovereign state except on the basis of an intention or policy articulated by Congress or the administrative agency to which Congress delegated the power to craft the regulatory program. There is no such intention or policy in this case.

CONCLUSION

For each of the reasons set forth above, this Court should note probable jurisdiction, or in the alternative grant a writ of *certiorari*, to review the opinion and judgment of the court below.

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MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION, PLAINTIFFS-APPELLEES,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office, DEFENDANTS-APPELLANTS.

AMERADA HESS CORPORATION, PLAINTIFF-APPELLEE,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office, DEFENDANTS-APPELLANTS.

NEW ENGLAND PETROLEUM CORPORATION,
PLAINTIFF-APPELLEE,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Northern District of New York

(Nos. 80 Civ. 543, 80 Civ. 570, 80 Civ. 544)

Before:

METZNER, PECK and LACEY, Judges.

METZNER, Judge.

This is an appeal from a judgment entered on an order granting plaintiffs' motion for summary judgment.

In June of 1980, New York State established a 2 per cent tax on the gross receipts of oil companies limited to their revenues derived from activities within the state. 1980 N.Y. Laws ch. 271, 272; N.Y. Tax Law § 182 (McKinney Supp. 1980). The statute further provided that the oil companies could not pass the cost of the tax on to consumers by increasing the sales price of their products in this state. Ten oil companies subject to the tax instituted suit to enjoin the anti-passthrough provision based on the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

Plaintiffs claim that the state statute is in conflict with the Emergency Petroleum Allocation Act (EPAA) (Pub. L. 93-159, 15 U.S.C. § 751, et seq.) and the regulations adopted thereunder. The district court agreed with that position and appeals followed to this court and the Court of Appeals for the Second Circuit.

The prosecution of the appeal in this court was stayed pending determination by the Court of Appeals.

On January 28, 1981 the Court of Appeals held that the district court in disposing of the question of preemption, had disposed of an EPAA issue over which this court had exclusive appellate jurisdiction. *Mobil Oil Corp. v. Tully*, 639 F.2d 912 (2d Cir. 1981).[1]

The question before this court is limited to whether the anti-passthrough provision of the New York Tax Law is invalid under the Supremacy Clause. The plaintiffs do not challenge the imposition of the tax. However, an affirmance of the district court's finding of unconstitutionality will void the tax. Section 12, L. 1980 c. 271, as added by L. 1980, c. 272, § 5.

In *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947), the Court set forth the criteria to be applied in determining whether the exercise by a state of its police power in the adoption of a statute may be challenged successfully under the Supremacy Clause.

> "Congress legislated here in a field which the States have traditionally occupied. See *Munn v. Illinois*, 94 U.S. 113; *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-149. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611; *Allen-Bradley Local v. Wisconsin Employment Board*, 315 U.S. 740, 749. Such a purpose

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1 The Court of Appeals held that it had jurisdiction to decide that the district court was not deprived of jurisdiction by the Tax Injunction Act (28 U.S.C. § 1341) because the statute under attack is an exercise of the police power rather than the taxing power of the State.

> may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co., supra*."

Preemption in this area is compelled "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Even if Congress has not foreclosed the field, a state statute is void to the extent of actual conflict with a federal statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 165 (1978); *Hill v. Florida*, 325 U.S. 538 (1945). This standard was recently outlined by the Supreme Court in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232, 4233 (March 9, 1981):

> ". . . when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' *Perez v. Campbell*, 402 U.S. 637, 649 (1971) quoting *Hines v. Davidowitz* . . . supra, at 67-68."

Judge McCurn found it unnecessary to decide whether Congress had intended that there be exclusive federal control

over allocation and pricing of petroleum products, resting his decision on the "conflict" standard for preemption. We, too, do not reach the "occupation of the field" question; we find sufficient basis under the conflict standard to exclude the State from exercising its police power in enacting the anti-passthrough provision.

The procedure in analyzing possible preemption under the conflict standard is to compare the two statutes; and second, to determine whether there is a conflict between them. This second inquiry focuses on the nature of the activity which the state has attempted to regulate, rather than the method of regulation used. *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., supra*, 49 U.S.L.W. at 4233.

With the advent of the Arab oil embargo in 1973, this country was faced with a national crisis in the flow of energy supplies and inflation. Congress addressed the problem in the passage of the EPAA. The statute stated that shortages of crude oil, residual fuel oil and refined petroleum products existed which would create severe economic hardships that would jeopardize the normal flow of commerce and "constitute a national energy crisis which is a threat to the public health, safety, and welfare, and can be averted or minimized effectively through prompt action by the Executive branch of Government." Section 751(a)(3). The statute went on to say that "the authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy." Section 751(b). Section 753(b)(1)(F) states, as one of the objectives of the statute, the "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices . . . ."

Senator Jackson, as floor manager of the bill, said, "Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level." 119 Cong. Rec. 17764 (1973). Finally, the conferees who submitted the bill for final passage by the Congress said:

> "On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods

> which will permit adequate compensation to assure that private property is not implicitly confiscated by the government." [1973] U.S. Code Cong. & Admin. News, pp. 2702-3

In adopting the 1975 amendments to EPAA, known as the Energy Policy and Conservation Act (EPCA), Congress reiterated its goal that "the Arab boycott raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level." [1975] U.S. Code Cong. & Admin. News, p. 1763.

The EPAA and the regulations form a framework for federal control of price and allocation of petroleum prices. However, the tenor of federal regulation of petroleum products has substantially changed since this action was brought and the decision of the district court was handed down.

In 1975 Congress gave the President authority to exempt, in his discretion, "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from price and allocation regulations under the EPAA, consistent with the nine statutory objectives noted above. 15 U.S.C. § 760a, Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975). The President has standby authority to reimpose regulation of any oil or refined product category which is exempted. 15 U.S.C. § 760a(f).

At the time this matter was submitted to the court below for determination, only gasoline, propane, and certain natural gas liquids remained subject to the price regulations. All other petroleum products had been exempted. On January 28, 1981, while this case was awaiting appellate disposition, President Reagan exercised his authority to exempt the remaining products. 46 Fed. Reg. 9909. Consequently, at the present time there are no price and allocation controls in existence.

However, despite the exemption of all petroleum products from price and allocation regulations by executive order, the federal slate has not been wiped clean. The standby authority of the President to reimpose controls (15 U.S.C. § 760a(f))

remains in effect, at least until that authority expires on September 30, 1981. 15 U.S.C. § 760g.

The regulations which were promulgated under the EPAA are a complex set of rules to allocate petroleum products; control prices charged; and dictate the method of computation of any increases in price. Subpart E, 10 C.F.R. §§ 212.81-85. Prices are controlled by limiting refiners to a "maximum allowable price," computed as the weighted average price at which the covered product was sold on May 15, 1973, plus defined increased product and nonproduct costs since that date. 10 C.F.R. §§ 212.82(6) and 212.83.

In 1977 "federal, state and local tax increases," excluding income taxes, were included in the nonproduct costs which the refiners were permitted to use to compute their maximum allowable price. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), 42 Fed. Reg. 5025 (January 27, 1977). Property, excise, franchise and similar taxes are explicitly included.

Turning now to the New York State statute, its purpose was to raise money to assist the public transportation system in the state which is in dire financial straits. To achieve this end, the state enacted a franchise tax, New York Tax Law § 182 (McKinney Supp. 1980), and, as pointed out above, this tax was within the group of taxes which an oil company under the federal regulations could have passed through to the consumer. The consuming public was to be protected against an increase in retail cost by the anti-passthrough provision and the fires of inflation would not be fed as a result.

The anti-passthrough provision is clearly a price control measure in exercise of the State's police power. The stated purpose of the provision is to prevent "further increases in the price of petroleum products to consumers," and to prevent the tax from "fueling inflation by prohibiting pass through of such tax to the consumers of this state." N.Y. Act, Ch. 272, § 1. As the Court of Appeals noted in another context, "[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." *Mobil Oil Corp. v. Tully, supra* at 918. We agree with this observation.

The federal controls were imposed to assure equitable distribution of oil products and equitable prices. The latter requires a fair balance between seller and buyer, and between geographical areas. The conferees stated that the sellers were to be assured adequate compensation to prevent the confiscation by the government of private property.

The state tax upsets this balance. The sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states.

Furthermore, the sellers, in order to recoup this loss, will try to pass on the cost of the franchise tax to purchasers in other states. To the extent that they are able to pass on the tax, the goal of equitable pricing is not met.

Appellants claim that the EPAA by its terms precludes a finding of preemption in this case. Section 755(b) provides:

> "The regulation under section 753 of this title and any order issued thereunder shall pre-empt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order."

The argument is made that since this section specifies preemption only if a state law providing for allocation of a product is in conflict with a regulation issued pursuant to Section 753, there can be no preemption if the conflict exists outside that narrowly defined area. Appellants rely on a letter from the Acting General Counsel of the Department of Energy (DOE) to the Special Counsel to the New York State Tax Commission. The letter states that in the opinion of the writer, "the Emergency Petroleum Allocation Act itself displaces State law only to the extent that that statute or its implementing regulations conflict with state law . . . ." It is interesting to note that the letter defines the area of preemption in slightly broader terms than appellants do—federal statute as well as regulations in conflict with state law.

The Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), set forth the criteria for judging the effective-

ness of this letter. "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

The writer of the letter took care to limit its effectiveness by stating as a caveat, "First, the time within which I was advised to require a response to this question did not permit an exhaustive analysis of the question you posed." Furthermore, as Judge McCurn said, "the conclusion of the letter was, in light of *Jones*, reached either with reference to, or through the correct application of, judicially determined preemption principles."

Finally, under DOE's own regulations, the letter is of little value. It appears that the request to DOE for an interpretation did not comply with its requirements for such an interpretation. Replies to such requests cannot be considered as interpretations but only as "providing general information." 10 C.F.R. 205.80.

Jones v. Rath Packing Co., 430 U.S. 519, 540-41 (1977) determined that even though an express preemption provision did not invalidate a state law, the question still had to be determined "whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " It borders on the ridiculous to conclude, in the context of the crisis being addressed here, that there may be preemption in the area of allocations, but there is no preemption in the area of pricing.

Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA expires by its terms on September 30, 1981. 15 U.S.C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price

control and in conflict with the objectives of the program. See *Ray v. Atlantic Richfield*, 435 U.S. 151, 178 (1978).

When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations.

Judgment affirmed.

Final Judgment of the Temporary Emergency Court of Appeals—June 15, 1981

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 2-29

MOBIL OIL CORPORATION, et al.,

Plaintiffs-Appellees,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

No. 2-30

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

No. 2-31

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee,

—v.—

JAMES H. TULLY, JR., et al.,

Defendants-Appellants.

Before:

METZNER, PECK and LACEY,

Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of New York and was argued by counsel.

In consideration whereof, it is ORDERED that the judgment of said court is AFFIRMED.

FOR THE COURT:

/s/ Ruth H. Jacobson

RUTH H. JACOBSON
Clerk

Judgment Entered: June 15, 1981

No. 2-29—District Court No. 80-CV-543

No. 2-30—District Court No. 80-CV-570

No. 2-31—District Court No. 80-CV-544

Notice of Appeal in the Temporary Emergency Court of Appeals—June 30, 1981

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

TECA Nos. 2-29, 2-30, 2-31.

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

AMERADA HESS CORPORATION,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of

New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James H. Tully, Jr., Thomas H. Lynch and Francis Koenig, constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York; and James L. LaRocca, Commissioner of the New York State Energy Office, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Temporary Emergency Court of Appeals entered in this action on June 15, 1981 which affirmed a judgment entered on an order of the United States District Court for the Northern District of New York (MCCURN, J.), 497 F. Supp. 888 (1980), granting appellees' motion for summary judgment.

This appeal is taken pursuant to 28 USC § 1254(2).

Dated: Albany, New York
June 30, 1981

ROBERT ABRAMS
Attorney General of the
State of New York

By /s/ Shirley Adelson Siegel
SHIRLEY ADELSON SIEGEL
Solicitor General
Attorney for Appellants
The Capitol
Albany, New York 12224

Opinion of the United States Court of Appeals for the Second Circuit in *Mobil Oil Corp., et al. v. Tully, et al., New England Petroleum Corp. v. Tully, et al.*, and *Amerada Hess Corp. v. Tully, et al.*, No. 80-7785—January 28, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MOBIL OIL CORP., ATLANTIC RICHFIELD CO., UNITED REFINING CO., INC., and GULF OIL CO., CHEVRON U.S.A. INC., AMOCO OIL CO., TEXACO INC. and EXXON CORP.,

Plaintiffs-Appellees,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES J. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

NEW ENGLAND PETROLEUM CORP.,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants.

AMERADA HESS CORP.,

Plaintiff-Appellee,

—against—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES J. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants.

Before:

MULLIGAN and VAN GRAAFEILAND, *Circuit Judges* and WERKER, *District Judge.**

MULLIGAN, *Circuit Judge*:

On June 18, 1980, New York Governor Hugh Carey signed into law two bills, Senate Bills 10188 and 10261, which created a new Section 182 of the New York Tax Law and established a

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* United States District Judge for the Southern District of New York, sitting by designation.

2% tax on the "gross receipts" of oil companies doing business in New York. 1980 N.Y. Laws, ch. 271, 272 (N.Y. Act); N.Y. Tax Law § 182 (McKinney Supp. 1980). The express purpose of the tax is to raise additional revenue to aid the State's ailing public transportation system. N.Y. Act, ch. 272 § 1. Indeed, it has been estimated by the New York State Division of the Budget that the new tax would raise an additional 235 million dollars annually. Oil companies were reported to have reaped unjustifiably high profits as a result of market conditions and were therefore deemed to be an appropriate source of revenue. N.Y. Act, ch. 272 § 1. In order to ensure that the oil companies, and not the consuming public, bore the burden of the tax, the legislature provided in Section 4(12)(a) of the Act (the anti-passthrough provision) that:

> [t]he tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12)(a) (McKinney Supp. 1980). Companies which are found to have passed on the cost of the tax through product pricing are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. N.Y. Tax Law § 182(12)(b)(2). In addition, the legislature hinged the viability of the tax itself upon the validity of the anti-passthrough provision. In 1980 N.Y. Laws, ch. 272, § 5 (the self-destruct provision), the legislature provided that:

> [i]f the provisions of [the anti-passthrough section] is [sic]: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212)

promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect [ten days thereafter].

The plaintiffs-appellees, ten oil companies concededly subject to the tax, instituted these actions in the Northern District of New York against the defendants-appellants, New York State Tax Commission, New York State Attorney General and the Commissioner of the New York State Energy Office, seeking declaratory and injunctive relief. The oil companies argued that the anti-passthrough provision was invalid (a) because it conflicted with the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, et seq. (EPAA) and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, issued thereunder and was therefore preempted by the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2); and (b) because it violated the Commerce and Due Process Clauses of the United States Constitution. At no time did the plaintiffs attack the validity of the tax itself. The plaintiffs, after expedited discovery, moved for summary judgment while the defendants moved to dismiss the actions for lack of federal jurisdiction under 28 U.S.C. § 1341, the Tax Injunction Act. By order dated September 4, 1980, the District Court denied the defendants' motion to dismiss and granted summary judgment in favor of the plaintiffs.

In a memorandum and decision dated September 19, 1980, Judge Neal G. McCurn held that the anti-passthrough provision was in effect a price control and not a rule of tax incidence. *Mobil Oil Corp. v. Tully*, No. 80-CV-543, slip op. at 10 (N.D.N.Y. September 19, 1980). The court therefore held that the Tax Injunction Act, 28 U.S.C. § 1341 was inapplicable. *Id.* In addition, because the "price control" provision was found to be in conflict with the EPAA and the regulations issued thereunder, Judge McCurn declared that the provision was preempted by federal law with respect to exempt and non-exempt petroleum products. *Id.* at 37, 43. Judgment was

entered on September 19, 1980 but on motion by the defendants-appellants, the District Court stayed enforcement until October 31, 1980. *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y. September 29, 1980). The stay was continued by this court in a ruling from the bench at oral argument on October 30, 1980.

The defendants-appellants appeal from Judge McCurn's order denying their motion to dismiss and granting the plaintiffs-appellees' motion for summary judgment. The appellees have moved before this court to dismiss the appeal for want of appellate jurisdiction. Arguing that this case "arises under" the EPAA, the appellees' position is that exclusive jurisdiction over all issues in this case is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), which incorporates the review provisions of Section 211(b)(2) of the Economic Stabilization Act. 12 U.S.C.A. § 1904, note (West Supp. 1980). Thus, this case and its companion case also decided today, *Mobil Oil Corp. v. Dubno*, No. 80-7677, slip op. ____ (2d Cir. ____) require an analysis of the appropriate allocation of appellate jurisdiction between a court of appeals and the TECA.

I

The Motion to Dismiss

(a) Preemption

The threshold issue on this appeal is whether this court has jurisdiction to hear it. The appellee oil companies have argued that Section 211(b)(2) of the ESA, 12 U.S.C.A. § 1904, note (West Supp. 1980), provides that the Temporary Emergency Court of Appeals (TECA) has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [ESA]." Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), incorporates by reference the jurisdictional provisions of § 211 of the ESA where there is judicial review of the regulations promulgated under Section

753(a) of the EPAA (mandatory allocation of crude oil, residual fuel oil and refined petroleum products) as well as any order or action taken by the President or his delegate under the chapter.

In *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979) we held that a case or controversy arises under the ESA or EPAA where the district court has adjudicated an "ESA issue." (The court used that expression to mean issues involving the ESA and the EPAA as well as regulations promulgated under both statutes. *Id.* at 182 n.3). The Tenth Circuit has indicated that an ESA issue is one "involving the construction, applicability and effect" of the EPAA, *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

The preemption issue presented here does not present an EPAA question which was adjudicated in the District Court and is thus within TECA's exclusive appellate jurisdiction. A major contention of the oil companies was that Section 182(12)(a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provisions thus void under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2). To make the determination that the state law conflicted with the federal regulations, as Judge McCurn found, necessitates "a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder." *Mobil Oil Corp. v. Tully*, supra, slip op. at 6. The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. *Id.* at 17-43. Whether that analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations.

The appellants argue that the preemption claims arise under the Constitution rather than the EPAA and thus do not pose an EPAA question. The argument is not persuasive. In *Swift &*

Co. v. Wickham, 382 U.S. 111 (1965), the Supreme Court held that the issue of preemption did not involve a substantial constitutional question so as to warrant the convening of a three judge court pursuant to 28 U.S.C. § 2282. The Court declared that the basic question involved in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Id.* at 120. See also *American Federation of Labor v. Watson*, 327 U.S. 582 (1946).

This Court has made a similar analysis in *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975):

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

It is obvious that in this case the trial court was obligated to and did make an analysis and interpretation of the two statutory schemes involved here, both state and federal. Having found that an impermissible conflict existed between the anti-passthrough provision and the federal statute, regulations and congressional policy, the finding of preemption was automatic. Appellants further argue that if arguendo the District Court did have exclusive jurisdiction in all suits arising under the EPAA, then it should not have adjudicated that issue but rather it should have followed the statutory mandate of Section 211(c) and made a determination as to whether a substantial constitutional question exists and if so "certify such issue to [TECA]." While our analysis would indicate that the substantial issue was statutory and regulatory analysis and interpretation rather than constitutional, the short answer to the contention is that the certification issue is a determination to be made by TECA and not this court. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711, 716 (TECA), cert. denied, 444 U.S. 879 (1979).

Appellants' further argument that an EPAA question is one limited to cases and controversies involving a regulation promulgated under Section 753(a) and not to all cases or controversies arising under the EPAA itself is at odds with our

statutory interpretation in *Coastal States Marketing v. New England Petroleum Corp., supra.* Here the District Court did analyze and apply the statute, the regulations and the underlying congressional policy. The District Court further made an adjudication resting on its interpretation of that federal scheme. It therefore decided an EPAA issue sufficient to vest TECA by statutory mandate with exclusive jurisdiction of this appeal on the preemption issue.

(b) The Anti-Injunction Act

The oil company appellees' motion to dismiss the appeals on jurisdictional grounds is also addressed to the second issue on this appeal—that 28 U.S.C. § 1341, the Tax Injunction Act, deprived the District Court of jurisdiction. The appellants argue that the determination of the District Court that 28 U.S.C. § 1341 did not deprive it of jurisdiction was erroneous. The appellees contend, however, that the issue was ancillary to the EPAA question and therefore within TECA's exclusive appellate jurisdiction. We disagree with both arguments.

Section 1341 precludes the district courts from enjoining, suspending or restraining "the assessment, levy or collection or any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is apparent that the inquiry of the District Court on this issue did not require any analysis of the EPAA or its regulations. It required solely an interpretation of a state statute to determine whether or not an injunction, suspension or restraint was proscribed by the federal statute. Appellees seemingly recognize this but denominate it as an issue ancillary to the EPAA preemption question and therefore within TECA's exclusive jurisdiction.

In a comparable setting TECA has declined to take jurisdiction. In *Texaco, Inc. v. Department of Energy,* 616 F.2d 1193 (TECA 1979) TECA declined to accept jurisdiction to review a District Court holding that the Federal Energy Regulatory Commission had review authority under the Department of Energy Organization Act even though the DOE actions were to be reviewed by the FERC were taken under the EPAA. The

court reasoned that since the District Court's only decision was that the FERC had review authority, which was under the DOE Act and not the EPAA, it could not exercise jurisdiction since it involved the interpretation of a statute not within the review provisions of 15 U.S.C. § 754(a). The court stated, ". . . TECA has repeatedly refused to exercise jurisdiction over issues or claims not arising under the EPAA even though they may be joined in the same case with other issues or claims that do arise under the EPAA." *Id.* at 1196.

Here the federal statutory prohibition is plainly not within the EPAA and the refusal of TECA to exercise such jurisdiction is reasonably to be anticipated. Obviously, the TECA position can result in bifurcated appeals as it will in this case but that has been anticipated by this court in *Coastal States Marketing v. New England Petroleum Corp., supra*, 604 F.2d at 185. It is desirable to defer to a specialized federal appellate court, TECA, with its special expertise on EPAA issues, which in this appeal, includes the preemption question involving analysis of the congressional intent in enacting the EPAA and the interpretation of the regulations adopted pursuant thereto.

The oil companies rely upon several TECA holdings where TECA did take jurisdiction over ancillary non-EPAA issues so that it could "perform . . . the normal and necessary functions of any court." *Quincy Oil Inc. v. Federal Energy Administration*, 620 F.2d 890, 893 (TECA 1980). However, TECA has exclusive jurisdiction only over EPAA issues. *Coastal States, supra*, 604 F.2d at 181. This Court as a court of appeals has concurrent jurisdiction in an appeal from a final order of a District Court over independent issues which do not present an EPAA question. *Id.* at 186. The Section 1341 question is substantial and is independently appealable to this court. The oil company's [sic] reliance on *M. Spiegel & Sons Oil Corp. v. B.P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976) is misplaced. That case did involve an appeal from an EPAA question which was within the exclusive jurisdiction of TECA as well as an ancillary issue—an appeal from an interlocutory order of the District Court refusing to transfer the action to another District Court. Our dismissal was based on the proposition that a

ruling on a transfer motion is not independently appealable under 28 U.S.C. § 1291(a)(1). In this case the Section 1341 issue is independent and severable from the EPAA question and presents us with an appealable order from a final order of the District Court.

We conclude therefore that the motion to dismiss the appeal on jurisdictional grounds is granted with respect to the preemption question and denied as to the Section 1341 issue.

II

Having determined that the preemption issue is within the exclusive jurisdiction of TECA and that the applicability of the Tax Injunction Act is properly before this court, we address the latter issue. Section 1341 is brief and facially clear:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The position of the State defendants is essentially that the order of the District Court has effectively restricted the "assessment, levy or collection" of a New York State Tax and is thus within the clear proscription of Section 1341. The oil companies argue that they do not at all challenge the validity of the tax but simply the anti-passthrough provisions which they denominate as an exercise not of the taxing power of the State but rather its police power. The anti-passthrough provision, they urge, is a price fixing statute and not a taxing device. While the statutory linkage between the validity of this provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, this was the calculated decision of the legislature and not the result of the court's determination. While the briefing and argument on this issue has been intensive, there is not authority precisely in point.

The State appellants argue that Section 182(12)(a) is a state tax law and that the State has the authority to select the target

of the tax. They rely upon language in *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 347-48 (1968) where the Court held invalid a Massachusetts statute which imposed a sales tax upon a national bank. In the course of its opinion the Court construed the state statute as imposing the legal incidence of the tax upon the purchaser rather than the vendor. The Massachusetts State Court from which the appeal originated had construed the statute to impose the tax on the vendor. In reversing, the court stated "[t]here can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." *Id.* at 348. It is difficult to understand how the State can reasonably construe this language to be helpful here. There was no Section 1341 issue in that case at all—the appeal was not from a district court but a state court. No one questions the right of the State of New York to place the legal incidence of the tax upon the oil companies—but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product.

As we have indicated the tax purpose of the legislation was to raise funds for the mass transit system. However, the purpose of the anti-passthrough provision was not to raise taxes but "to do nothing that will contribute to further increases in the price of petroleum products to (New York) consumers" and "to prevent such gross receipts tax from fueling inflation by prohibiting the passthrough of such tax to the consumers of this state." N.Y. Act, ch. 272, § 1.

This objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products. We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, the State has gone beyond its taxing powers and has employed its police powers. Whether this is appropriate is not the issue before us; whether it results in a collision with EPAA is for

TECA. We simply hold that that action is not insulated from federal scrutiny by Section 1341.

The mere fact that the anti-passthrough section is contained in a tax law of the State should not lead to automatic sanctuary under Section 1341. In *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), this court held that a District Court was not prevented from considering the constitutionality of a Vermont Motor Vehicle Tax which provided for the suspension of a motor vehicle license if the owner failed to pay the tax due under the state law. An indigent claimed that such suspension created irreparable and immediate hardship and harm to him in violation of his equal protection rights under the fourteenth amendment. This court found that his attack did not seek a restraint upon the assessment, levy or even the collection of the tax.

That the attack of the oil companies is not on those sections of Section 182 which provide for the assessment, levy or collection of the tax within the prohibition of Section 1341, is bolstered by the statement of James H. Tully, Jr., Commissioner of Taxation and Finance of the State of New York in his affidavit in support of a stay which states in part that the plaintiffs "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." He further stated that anti-passthrough provision "is all that the court enjoined."

We agree therefore with the District Court that the anti-passthrough provision is not an exercise of the taxing power of the State within Section 1341 but rather of its police powers directed to its express concerns about inflation and rising fuel costs. A constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341.

Having so held we need not address the issue of whether or not a plain, speedy and efficient remedy may be had in the courts of this State.

The stay of enforcement is continued by this court and shall continue only until such time as the State can seek a stay from TECA. Any motion for further relief should be directed to that court.

Opinion of the United States District Court for the Northern District of New York in *Mobil Oil Corp., et al.* v. *Tully, et al.*, *New England Petroleum Corp.* v. *Tully, et al.*, and *Amerada Hess Corp.* v. *Tully, et al.*, Nos. 80 Civ. 543, 80 Civ. 544, 80 Civ. 570—September 19, 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, UNITED REFINING COMPANY, INC. and GULF OIL COMPANY,

Plaintiffs,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants.

AMERADA HESS CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEAL P. MCCURN, *D. J.*

MEMORANDUM AND DECISION

Plaintiffs in these actions seek (a) a declaration that section 182(12) of the New York Tax Law, as added by L. 1980, ch. 271 § 4 and ch. 272 § 2, which prohibits the passthrough of the State's recently enacted two (2%) percent gross receipts tax on certain oil companies is unconstitutional and thus invalid and (b) a permanent injunction enjoining the defendants from enforcing the anti-pass through provision. Relief is sought on the grounds that the anti-pass through provision (1) establishes a state price control rule which conflicts with the Federal Emergency Petroleum Allocation Act of 1973, §§ 1-19, 15 U.S.C. § 751-760h as amended, (EPAA), and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212 (Price Regulations) promulgated thereunder, and is thus void under the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, cl. 2); (2) impermissibly burdens interstate commerce and thus is void under the Commerce Clause of the United States Constitution (U.S. Const. Art. I, § 8, cl. 3); and (3) contravenes the Due Process Clause of the Four-

teenth Amendment to the United States Constitution. (U.S. Const. Amend. XIV, § 1).

Plaintiffs in all three actions assert jurisdiction under 28 U.S.C. §§ 1331 and 1337. In addition, plaintiffs in the Mobil Oil and Amerada Hess actions claim that exclusive original jurisdiction is vested in this Court by § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), as expressly incorporated by reference in § 5(a) of the EPAA (15 U.S.C. § 754(a)], and section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b).[1]

The three actions are presently before the Court on the defendants' motion to dismiss pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 and the plaintiffs' motions for summary judgment under Rule 56 of the Fed. R. Civ. P. on their respective pre-emption claims.[2]

THE NEW YORK LEGISLATION

On June 18, 1980, the Governor of New York State signed into law two bills which impose an annual tax "upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the State as

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1 Plaintiffs in the Mobil Oil action also include section 210(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note in their exclusive jurisdiction claim.

2 A pretrial conference with regard to all three actions was held by the Court on July 29, 1980, for the purpose of establishing an accelerated litigation schedule. At that conference it was decided that defendants' motion to dismiss would be argued on August 20, 1980. It was further determined that motions for summary judgment to be brought by the plaintiffs would be heard on August 27, 1980, and would be limited to the parties' pre-emption claims, without prejudice to plaintiffs' seeking summary judgment on their Commerce and Due Process claims at a later date.

Plaintiff, New England Petroleum Corporation's motion for a preliminary injunction with a consolidated hearing on the merits pursuant to Rule 65 of the Fed. R. Civ. P. was scheduled to commence September 10, 1980.

hereinafter provided. . . ." (L. 1980, ch. 271, § 4).[3] The tax is imposed on each company "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity or of maintaining an office in this state, for all or any part of its taxable years." *Id.* Pursuant to the statute the term gross receipts covers all receipts with the exception of "[r]eceipts received by reason of any sale of fuel oil (excluding diesel motor fuel) used for residential purposes" and "receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section." *Id.*

Revenue collected through the imposition of this new tax is earmarked to go into the "regional transportation operating and capital assistance fund", created by the legislation (L. 1980, ch. 271 §§ 2, 11), and is to be used to provide operating and capital assistance to New York State's mass transportation system.

An additional provision of the State's new revenue raising plan prohibits the pass-through of the tax in the prices charged to consumers for products sold by the oil companies in New York State. The anti-pass through provision, which is set forth in subsection 12(a) of the new section 182 of the New York Tax Law, provides that:

> The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

L. 1980, ch. 271, § 4 (12)(a).

Under the new law, each oil company subject to the tax is required to file an annual report with the Commission of Taxation and Finance "certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state the tax imposed by this section." L. 1980, ch.

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3 The full text of Senate Bills 10188 and 10261 is set forth in an Appendix to this Memorandum-Decision.

271, § 4. Companies which are found to have passed on the cost of the new tax through increased product costs or who are found to have filed false reports in violation of the certification requirement are subject to a penalty equal to one hundred (100%) percent of the tax imposed for the year in which the violation occurs. L. 1980, ch. 271, § 4(12)(b)(2).

The plaintiffs in these actions are oil companies within the meaning of the legislation involved in this litigation and are, therefore, subject to the gross receipts tax. Each, in the normal course of business, would generally pass on the cost of the new tax through increased petroleum product prices to customers in the taxing jurisdiction.

None of the plaintiffs challenges the imposition of the gross receipts tax itself. Rather, they challenge only the anti-pass through provision of § 182(12)(a), which is now in effect. As previously indicated, the plaintiffs' motions for summary judgment which are before the Court are limited to the pre-emption claims.

Analysis of the pre-emption claims shall necessitate a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder. However, since the need for a determination on the preemption issue would disappear should the Court grant the defendants' motion to dismiss, that motion should be addressed and disposed of first.

MOTION TO DISMISS

Defendants contend that the Tax Injunction Act, 28 U.S.C. § 1341, divests the Court of jurisdiction in these actions. Plaintiffs disagree. Section 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The defendants' argument for application of the Tax Injunction Act in these cases is basically as follows. Plaintiffs are

challenging the validity of the anti-pass through provision of the new oil company franchise tax legislation. If plaintiffs are successful in having the anti-pass through invalidated, the gross receipts tax, by the terms of the New York legislation "shall cease to be in force and effect." L. 1980, ch. 271, § 12, as amended by L. 1980, ch. 272, § 5. Thus, according to the defendants, the plaintiffs' attack on the anti-pass through provision is in reality an attack on the tax itself. Since a decision by this Court striking down the anti-pass through provision would by virtue of the statutory mandate, effectively "enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law," defendants conclude that the Court is without jurisdiction pursuant to 28 U.S.C. § 1341.

Plaintiffs challenge the defendants' conclusion as to the applicability of 28 U.S.C. § 1341 in these actions and disagree as well with defendants' assertion of the availability to plaintiffs of a "plain, speedy and efficient remedy" in the Courts of New York State. In disputing the existence of a State Court remedy acceptable under 28 U.S.C. § 1341, plaintiffs argue that exclusive jurisdiction over their pre-emption claim rests in federal district court by virtue of § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), which as previously pointed out was expressly incorporated by reference in § 5(a) of the EPAA, 15 U.S.C. § 754(a). Thus, according to plaintiffs there is no state court remedy available.

Since, for reasons to be discussed below, the Court does not find the Tax Injunction Act, 28 U.S.C. § 1341, applicable to these actions, it will not be necessary to reach plaintiffs' exclusive jurisdiction claim.

The Tax Injunction Act embodies long-standing principles of equity and federalism which recognize "the imperative need of a State to administer its own fiscal operations."[4] *Tully* v.

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4 The legislative history of the Tax Injunction Act suggests two purposes behind its passage. The first was to eliminate the discrimination between citizens of a state who were confined to state court in challenging illegal tax assessments and foreign corporations who were able to take advantage of diversity jurisdiction in federal court.

Second, Congress wished to prevent foreign corporations from paralyzing state fiscal operations by refusing to pay state taxes and

Griffin, 429 U.S. 68, 73, 97 S. Ct. 219, 222, 50 L. Ed. 2d 227 (1976). Quoting from the decision of the Supreme Court in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 298, 63 S. Ct. 1070, 1073, 87 L. Ed. 1407 (1943), the Court in *Tully* stressed that:

> Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final restraining collection of state taxes.

Tully v. *Griffin, supra*, 429 U.S. at 73, 97 S. Ct. at 222. *See also Matthews* v. *Rogers*, 284 U.S. 521, 525-526, 52 S. Ct. 217, 219, 76 L. Ed. 477 (1932).

Section 1341 has been found to apply equally to actions for declaratory or injunctive relief. *Houston* v. *Standard-Triumph Motor Co.*, 347 F.2d 194, 198 (5th Cir. 1965); *Helmsley* v. *City of Detroit*, 320 F.2d 476, 478 (6th Cir. 1963); *First United Methodist Church* v. *City of Syracuse*, 489 F. Supp. 185 (N.D.N.Y. 1980).

The Tax Injunction Act has served as the basis for dismissal on jurisdictional grounds of actions directly challenging the validity of a state tax, *see e.g. American Commuters Ass'n* v. *Levitt*. 279 F. Supp. 40 (S.D.N.Y. 1967) *affd.* 405 F.2d 1148 (2d Cir. 1969); *57th St. Management Corp.* v. *City of New York*, 456 F. Supp. 286 (S.D.N.Y. 1978); actions attacking particular aspects of state taxing schemes, which bore a direct relationship to the successful assessment and collection of the tax, *see*

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then commencing long and expensive litigation in federal court. S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 1415-17 (1937). *See also Garrett* v. *Bamford*, 528 F.2d 63, 72 (3d Cir.) *cert. denied* 429 U.S. 977, 97 S. Ct. 485, 50 L. Ed. 2d 585 (1976); *Tramel* v. *Schrader*, 505 F.2d 1310, 1315-16 (5th Cir. 1975).

The Supreme Court, however, has consistently described the Act's passage as a confirmation of the traditional equity practice of federal courts' refraining from exercising jurisdiction over actions challenging state taxes as long as an adequate state remedy was available. *See Tully* v. *Griffin, supra*, 429 U.S. at 73; *Great Lakes Dredge & Dock Co.* v. *Huffman, supra*, 319 U.S. at 298.

e.g. Mandel v. *Hutchinson*, 336 F. Supp. 772 (C.D. Cal. 1971) *aff'd*, 494 F.2d 364 (9th Cir. 1974); and lawsuits challenging the procedures and methods employed in the levy or collection of a state tax. *See e.g. Czajkowski* v. *State of Ill.*, 460 F. Supp. 1265, 1271-74 (N.D. Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978); *Kimmey* v. *H.A. Berkheimer, Inc.*, 376 F.Supp. 49, 54-55 (E.D. Pa. 1974), *aff'd mem.*, 511 F.2d 1394 (3d Cir. 1975).

Section 1341 has, on occasion, been found inapplicable in cases involving an aspect of a state taxing scheme. In *Hargrave* v. *McKinney*, 413 F.2d 320 (5th Cir. 1969), the Court found that § 1341 did not require dismissal of an action in which the plaintiffs sought the collection and disbursement of certain county tax monies rather than an injunction on collection of taxes.

The Second Circuit in *Wells* v. *Malloy*, 510 F.2d 74 (2d Cir. 1975), refused to apply the Tax Injunction Act where the plaintiff challenged a Vermont statute which suspended the state motor vehicle purchase and use tax. Writing for the Court, Judge Friendly stated that in enacting the Tax Injunction Act

> Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law *going to the validity of the particular taxes imposed upon them* (footnote references omitted)—not to a case where a taxpayer contended that an unusual sanction for nonpayment of a tax admittedly due violated his constitutional rights. . . . (Emphasis supplied)

Id. at 77.[5]

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5 The new Tax Injunction Act has also been found to be inapplicable in actions which are either brought by the United States or which although brought by a private individual or group could have been commenced by the United States. *See e.g. Moe* v. *Consolidated Salish and Kootenai Tribes*, 425 U.S. 463, 473, 96 S. Ct. 1634, 1641, 48 L. Ed. 2d 96 (1976); *Department of Employment* v. *United States*, 385 U.S. 355, 358, 87 S. Ct. 464, 466-67, 17 L. Ed. 2d 414 (1966).

There is no question but that the gross receipts tax on oil companies would cease to be in effect at a statutorily ordained time after a determination by the Courts that the anti-pass through provision now under attack is invalid. Nonetheless, this Court as previously stated, does not believe that these cases fall within the jurisdictional proscription of the Tax Injunction Act.[6]

The plaintiffs are not challenging the validity of the gross receipts tax nor are they attacking the statutorily prescribed administrative procedure for assessing, levying or collecting the tax. In fact, but for the "self-destruct" mechanism included in the legislation, a determination by this Court invalidating the anti-pass through provision would have absolutely no affect on the "assessment, levy or collection" of the gross receipts tax. 28 U.S.C. § 1341.

Defendants describe the tax and the anti-pass through provision as a "single entity", with the latter provision being merely a "rule of tax incidence".[7] Plaintiffs, on the other hand, argue that the anti-pass through provision is a state price control measure separate from the tax itself. The Court, having carefully reviewed the statutory language of S-10188 and 10261 agrees that the anti-pass through provision is a price control measure, rather than a rule of tax incidence. *See Schirtzinger* v. *Dunlop*, 489 F.2d 1307, 1310 (Temp. Emer. Ct. of App. 1973) (treating passthrough regulations as a form of price control), and is of the opinion that the "self-destruct" mechanism contained in the legislation indicates an intent on the part of

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6 The Fifth Circuit Court of Appeals in *Hargrave* v. *McKinney, supra*, 413 F.2d at 326, cautioned that:

> Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. *Cf. Phillips* v. *United States*, 1941, 312 U.S. 246, 251, 61 S. Ct. 480, 85 L. Ed. 800.

7 Although the State can label the anti-pass through provision any way it wishes, for the purpose of determining the applicability of 28 U.S.C. § 1341, the Federal definition of tax is to be employed. *Robinson Protective Etc.* v. *City of Philadelphia*, 581 F.2d 371, 375 (3d Cir. 1978).

the state legislature to impose the gross receipts tax on oil companies *only* if it can in addition impose controls on the prices charged by the companies for products sold in New York State. The statement of legislative findings and declaration of purpose, following discussion of the State's mass transit fiscal crisis, provides that:

> It is also found that oil companies are currently reaping historically high profits. These increased profits do not result from the application of normal management techniques and strategies which any business uses to maximize profits, but rather result from the market conditions prevailing within the international oil industry, which are artificially inflating the price of petroleum products. In view of the high cost of petroleum, the importance of energy conservation and New York's dependence upon foreign energy suppliers, *oil companies have become businesses clothed with a public interest*. (Emphasis supplied)

L. 1980, ch. 272, § 1.

The statement goes on to indicate an awareness on the part of the Legislature of the problems involved in supporting a mass transportation system in light of the "economic recession" and "Inflationary cycle". *Id.* The Legislature, having determined that it did not wish to contribute to the "inflationary spiral" or "contribute to further increases in the price of petroleum products to consumers" expressed the following legislative intent:

> The legislature hereby determines and declares that it is the public policy of the state to tax the gross receipts of oil companies and at the same time to prevent such gross receipts tax from fueling inflation by prohibiting the pass through of such tax to the consumers of this state.
>
> Therefore, it is the intent of the legislative that the gross receipts tax shall cease and terminate if such tax shall be permitted, either by judicial adjudication or by any formal opinion or ruling or in any other manner, to be included either directly or indirectly in the sales price of the products of the oil company.

The foregoing language suggests to the Court that the Legislators anticipated that the anti-pass through provision of the legislation might be challenged, apart from any attack on the tax itself, and that it might be struck down by the Courts with no threat to the continued collection of the tax. The fact that the State chose to make the taxes' survival dependent upon the survival of a provision which constitutes an exercise of the State's police power rather than taxing power does not, in the opinion of this Court, justify the application of the Tax Injunction Act.

The Court does not question the State's authority to enact a taxing statute, the survival of which is inextricably linked to the survival of legislation constituting an exercise of the State's police power. However, it does not accept the defendants' argument that the question of constitutionality of such an exercise of police power can be insulated from Federal judicial scrutiny through a legislatively imposed linkage with a state taxing measure.[8] Therefore, the Court finds that it has jurisdic-

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8 In seeking dismissal of these actions under 28 U.S.C. § 1341, defendants ask the Court to closely examine the long history of hostility to government by Federal injunction and the traditional Federal policy of non-intervention in certain state governmental matters.

In that regard, defendants point to the enactment of the Norris-LaGuardia Act of 1932 (29 U.S.C. §§ 105-115), which restricts the Federal Courts' power to issue injunctions in labor disputes and the Johnson Act of 1934, 28 U.S.C. § 1342, which prohibits Federal Courts from issuing injunctions of public utility rate orders and after which the Tax Injunction Act was "modeled". 81 Cong. Rec. 1415 (1937).

It is interesting to note, in that regard, that the Johnson Act, which deals with what are in effect price control measures (public utility rates) precludes the issuance of Federal Court injunctions only if "[t]he order does not interfere with interstate commerce". 28 U.S.C. § 1342(2). The Tax Injunction Act, of course, contains no such exception. While it is conjecture on the part of this Court, it would appear that Congress, in passing the Tax Injunction Act, anticipated that it would be applicable only in situations involving a state's internal fiscal affairs. Price controls, however, by their very nature are more apt to have an effect which reaches outside of the boundaries of the State, thus calling for the exception in the Johnson Act, and perhaps bolstering the Court's determination in these cases.

tion in these actions under 28 U.S.C. §§ 1331, 1337, 2201 and 2203 and hereby denies the defendants' motion to dismiss pursuant to the Tax Injunction Act.

SUPREMACY CLAUSE

Plaintiffs seek judgment invalidating the anti-pass through provision on the grounds that it is pre-empted by the EPAA and the price control regulations promulgated thereunder and is thus void under the Supremacy Clause of the Constitution.

The Supremacy Clause provides that ". . . the Laws of the United States . . . shall be the supreme Law of the Land, . . . any thing in the Constitution or Laws of any State to the contrary notwithstanding." (U.S. Const. Art. VI, cl. 2).

The Supreme Court has frequently cautioned that in cases such as these involving a challenge to a State's police power under the Supremacy Clause that the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L. Ed. 2d 179 (1978), quoting from *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). *See also Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604, *reh'g. denied* 431 U.S. 925 (1977).

There are two recognized grounds for finding preemption of state legislation by federal law.[9] The first is where Congress has chosen to completely occupy the field, to the exclusion of the states, in which case states may not regulate within the field even when the regulation is in harmony with the federal scheme. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525, 97 S. Ct. at 1309. The second is where, although Congress has not

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9 State statutes can also be pre-empted by Federal regulations properly promulgated under a Federal statute where there is a conflict between State and Federal regulations. *See e.g. Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 536, 97 S. Ct. at 1315.

completely foreclosed state legislation in a particular area, the state law conflicts with a valid federal statute. *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158, 98 S. Ct. at 994.

Congressional intent to totally occupy a particular field, precluding any state regulation may be "explicitly stated in the [federal] statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525, 97 S. Ct. at 1309. *See also City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S. Ct. 1854, 1859, 36 L. Ed. 2d 547 (1973).

The Supreme Court in *Rice* v. *Santa Fe Railroad*, *supra*, 331 U.S. at 230, 67 S. Ct. at 1152, explaining that an implied congressional intent could be "evidenced in several ways", stated that:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. [Citations omitted] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Citations omitted] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[10]

Under the second form of pre-emption, conflict voiding a state statute will be found:

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10 It must be kept in mind, however, that the existence of pervasive and complex regulations does not, in every case, demonstrate a Congressional intent to completely occupy a particular field. *See New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415, 935 S. Ct. 2507, 2514, 37 L. Ed. 2d 688 (1973), in which the Supreme Court cautioned that:

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . . .

> "where compliance with both federal and state regulations is a physical impossibility. . . ," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, *supra*, at 526, 540-541. *Accord*, *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976).

Ray v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158, 98 S. Ct. at 944-995.

On occasion a pre-emption conflict may be found absent an actual conflict between state and federal law, where it is clear that Congress has addressed the issue and decided that the particular field should remain unregulated. As explained by the Supreme Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S. Ct. 1026, 1030, 91 L. Ed. 1234 (1967) and recently reiterated in *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 178, 98 S. Ct. at 1004-1005:

> "where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

However, as recently pointed out by Judge Blumenfeld in *Mobil Oil Corp.* v. *Dubno*, No. H-80-359 (D. Conn. July 9, 1980) a Connecticut case also involving an anti-pass through provision enacted in conjunction with a gross receipts tax on oil companies in that State:

> [the] mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy. Rather, "[t]he pertinent inquiry [is] whether [fed-

> eral authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by Congress, and, after balancing the competing interests whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals. *Ray* v. *Atlantic Richfield Co.*, . . . at 174, 177. . . .

Id., Slip Op. at 13.

Finally, it should be noted that a state law cannot escape invalidation on pre-emption grounds because its purpose promotes a valid state interest if its effect "frustrates the full effectiveness of federal law." *Perez* v. *Campbell*, 402 U.S. 637, 651-652, 91 S. Ct. 1704, 1712, 29 L. Ed. 2d 233 (1971).

The Court explained in *Perez* that:

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentically [sic] furthered by the proposed state law.

Plaintiffs will be entitled to summary judgment on their pre-emption claims pursuant to Rule 56 of the Fed. R. Civ. P. "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving [parties are] entitled to judgment as a matter of law". Fed. R. Civ. P. 56(c).

After review of the papers submitted by the parties to the actions and analysis of the EPAA and the Price Regulations promulgated thereunder, the Court is of the opinion that there

are no genuine issues as to any material fact on the pre-emption issue, and finds that plaintiffs are entitled to summary judgement on that claim.[11]

THE EPAA AND THE FEDERAL REGULATORY SCHEME

The Emergency Petroleum Allocation Act

Congress enacted the EPAA in 1973 in response to the Arab oil embargo which had created shortages of various petroleum products which "constitute[d] a national energy crisis which [was] a threat to the public health, safety, and welfare and [could] be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government." 15 U.S.C. § 751(a)(3).

The stated purpose of the Act was to:

> . . . grant the President of the United States and direct him to exercise specific temporary authority to deal with *shortages* of crude oil, residual fuel oil, and refined petroleum products or *dislocations in their national distribution system*. . . . [Emphasis supplied]

15 U.S.C. § 751(b).

As indicated in the preceding statutory language, the EPAA was initially considered by Congress to be a temporary measure enacted to deal with an emergency situation on a national level.

The President was required under the Act, to:

> promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product in amounts specified in (or determined

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11 There is no question but that the legal issues raised in plaintiffs' pre-emption claims are complex. The Second Circuit, however, in *S.E.C.* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) has made it clear that summary judgment is not necessarily inappropriate simply because the legal issues are complex.

> in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

15 U.S.C. § 753(a).

Authorization was granted under the EPAA for the President to delegate his authority under the Act "to such officers, departments or agencies of the United States, or to any State (or officer thereof), as he deems appropriate." 15 U.S.C. § 754(b).

The Department of Energy (DOE), was created by Congress in August of 1977 (Department of Energy Organization Act, Pub. L. No. 95-91, § 201, 91 Stat. 569 (1977)), and in February of 1978, the President delegated his authority under the Act to the Secretary of Energy who at the present time has control over the mandatory allocation program. Exec. Order No. 12038, 43 Fed. Reg. 4957 (Feb. 7, 1978).[12]

While the actual promulgation of regulations under the EPAA was left to the President, Congress did set forth guidelines defining the requisite area of coverage in the form of objectives which the regulations were to provide for "to the maximum extent practicable." 15 U.S.C. § 753(b)(1). Those objectives, set forth at 15 U.S.C. § 753(b)(1)(A)-(I) are:

> (A) protection of public health (including the production of pharmaceuticals), safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;
>
> (B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or

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12 The President first delegated his authority under the EPAA to the Federal Energy Office (FEO) in December of 1973, Exec. Order No. 11748, 38 Fed. Reg. 33575. In June of 1974 the President abolished the FEO and delegated his authority to the Federal Energy Administration (FEA), which had been created by Congress in the Federal Energy Administration Act of 1974, Pub. L. 93-275, § 3, 88 Stat. 97 (1974). Exec. Order No. 11790, 39 Fed. Reg. 23185 (June 27, 1974). Authority remained in the (FEA) until delegated to the Secretary of Energy in 1978.

investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto.

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Congress, in addition, directed that:

> In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section—
>
> (A) shall provide for a dollar-for-dollar pass through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level. . . .

In 1975, Congress added 15 U.S.C. § 760(a) to the EPAA. Energy Policy and Conservation Act, Publ. L. No. 94-163, 89 Stat. 871 (1975). Whereas the imposition of allocation and price controls was mandatory under the 1973 Act, this section gave the President the authority to, in his discretion, and in accordance with the guidelines and procedural requirements set forth in the law, exempt "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from the price and allocation regulations under the EPAA.

The criteria for amendment of regulations under § 753(a) is a determination by the President that:

> such amendment is consistent with the attainment to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title and that the regulation, as amended, provides for the attainment to the maximum extent practicable, of such objectives.

15 U.S.C. § 760a(b).

Before any amendment to the regulations which pertains to either the allocation of or the price or manner of determining the price of crude oil, residual fuel oil or refined petroleum product could be promulgated, it had to be submitted for Congressional approval. 15 U.S.C. § 760a(C)(1) and (2).[13]

The President was also required to submit in support of the proposed amendment "a finding that such amendment [was] consistent with the attainment of the objectives specified in

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13 Effective May 31, 1979, proposed amendments exempting products from the mandatory allocation and price regulations need not be submitted for Congressional approval. 15 U.S.C. § 760g; 44 Fed. Reg. 19425 (1979).

section 753(b)(1) of this title," and in the case of a proposed amendment to the price control regulations, "a finding that market forces [were] adequate to protect consumers and that exempting such oil or refined product category [would] not result in inequitable prices for any class of users of such oil or product." 15 U.S.C. § 760a(d)(1).

In addition, the President was required to submit with each proposed amendment a statement of his views as to:

> the potential economic impact (if any) of such amendment which, where practicable, shall include his views as to—
>
> (i) the State and regional impacts of such amendment (including effects on governmental units);
>
> (ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as a fuel or as feedstock for industry; and
>
> (iii) the effects on employment and consumer prices; and
>
> (B) in the case of an exemption [from the price control regulations] an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

15 U.S.C. § 760(a)(d)(2).

Under the 1975 amendment to the EPAA, the President was also given standby authority to at any time reimpose allocation and price control regulations on any previously exempted oil or refined product "upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 753(b)(1) of this title." 15 U.S.C. § 760a(f).

Federal Regulation Under the EPAA

Comprehensive regulations governing the allocation and pricing of petroleum products were promulgated and implemented in response to the EPAA mandate. The petroleum pricing regulations, at subpart E, 10 C.F.R. §§ 2121.81-85 control the prices charged by refiners for petroleum products and specify the method to be used in computing price increases.

Under the pricing regulations the "maximum allowable price" which refiners can charge for covered products is "the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, . . . plus increased product costs and increased non-product costs incurred between the month of measurement and the month of May 1973." 10 C.F.R. § 212.82.

Initially, the regulations allowed refiners to pass-through non-product costs only upon notification to and approval of the FEA, the agency to which the President had first delegated his authority under the EPAA. However, in December of 1974 the FEA amended the regulations by recognizing eight specific categories of increased non-product costs, which refiners could pass-through without prenotification. 39 Fed. Reg. 42368 (December 5, 1974). The amendment also left the door open to seek agency permission for the passthrough of "disproportionately high non-product costs increases which [did] not fall into one of the categories defined by FEA," on a case-by-case basis. *Id.*

In January of 1977, the regulations concerning the pass-through of non-product costs were further amended to add additional categories.[14] 42 Fed. Reg. 5023 (January 27, 1977). As a result of this amendment, refiners were and are presently allowed to include in the price of covered products the dollar amount of their increased costs for "federal, state, and local

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14 For a complete list of non-product costs which may be included in the price of covered products see 10 C.F.R. § 212.83(c)(2)(iii)(E).

property, excise, franchise and other similar taxes." 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The regulation specifically provides that "[f]ederal, state and local income taxes are not includable in this amount." *Id.*

The regulations also dictate the manner in which allowable cost increases are to be allocated among a refiner's customers. 10 C.F.R. § 212.83(c) and (h). The "equal application rule," at 10 C.F.R. § 212.83(h) encourages refiners to allocate increases equally among classes of purchasers by requiring that the refiner in determining the amount of its unrecouped cost increases to arrive at the maximum allowable price which can be charged in the subsequent month,

> . . . shall calculate its revenues as though the greatest amount of increased costs actually added to any May 15, 1973, selling price of the product concerned and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973, selling price of that product and included in the price charged to each class of purchaser.

Id.

In other words, even if a refiner has not applied cost increases equally among all classes of purchasers, the refiner will be *deemed* to have done so and will not have the deemed amounts available for further increases.[15]

At the present time only automotive gasoline, propane and certain natural gas liquids remain subject to the previously described price control regulations (10 C.F.R. §§ 210.35, 212.56-62); all other petroleum products having been exempted

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15 The non-product cost increases cannot necessarily be included in product prices immediately as incurred. Rather the costs are placed in the refiners "bank," to be passed through in accordance with the price control regulations at 10 C.F.R. § 212.83(c). Both actual price increases and increases deemed to have occurred under the equal application rule reduce the amount in the refiners "bank." Thus, a refiner is penalized for failure to apply cost increases equally to all classes by the reduction in its "bank" for cost increases not actually made.

The regulations at 10 C.F.R. § 212.83(f) set forth the sequence in which increased costs shall be deemed to have been recovered.

in accordance with the procedures set forth at 15 U.S.C. § 760a.[16]

In each instance in which an administrative decision has been made to exempt a particular petroleum product from regulation, it has been based upon findings (1) that the product is not in short supply; (2) that deregulation will not have an adverse impact on supply; (3) that competition and market forces provide adequate protection for consumers (or possibly greater protection); (4) that exemption will not result in inequitable prices for any class of users; and (5) that exemption is consistent with the attainment of the objectives set forth at section 4(b)(1) of the EPAA.

It should be noted that the price control regulation on presently exempt petroleum products have not been repealed, but rather have been "in effect converted to standby status, so that in the event of shortages or other occurrences which might require reimposition of controls, they may be quickly put into effect." 41 Fed. Reg. 30096, 30098 (July 22, 1976).[17]

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16 The products which have been exempted are residual fuel oil, 41 Fed. Reg. 13896 (April 1, 1976); No. 2 heating oil and No. 2-D diesel fuel, 41 Fed. Reg. 24518 (June 16, 1976); No. 1 heating oil, No. 1-D diesel fuel and kerosene, 41 Fed. Reg. 24518 (June 16, 1976); naphthas, gas oils, benzene, greases, hexane, lubricant base oil stocks, lubricants, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products, 41 Fed. Reg. 30096 (July 22, 1976); aviation turbine fuel (naphtha-based and kerosene-base) 41 Fed. Reg. 40452 (Sept. 20, 1976); aviation fuel (kerosene-type) and aviation gasoline, 44 Fed. Reg. 7070 (Feb. 5, 1979); and butane and natural gasoline. 44 Fed. Reg. 70118 (Dec. 6, 1979); Codified at 10 C.F.R. § 210.35.

17 41 Fed. Reg. 30096, 30098 (July 22, 1976) concerns the exemption from price controls of naphthas and gas oils. The agency reports on the exemption of other products contain similar language concerning the conversion of the regulations to standby status. See n. 16, *supra*, for Federal Register citations relating to specific exemption determinations.

ANALYSIS OF PLAINTIFFS' PRE-EMPTION ARGUMENT

The anti-pass through provision contained in the New York gross receipts tax legislation applies both to petroleum products which are currently subject to the federal price control regulations and those which are presently exempt. Plaintiffs' pre-emption claims extend to both.

Applicable Test of Pre-emption

Plaintiffs rely upon both of the judicially recognized grounds for pre-emption of state law by Federal statutes and regulations. Defendants, however, contend that the question of pre-emption is not to be resolved through application of the "exclusive occupation" or "conflict" tests repeatedly articulated by the Supreme Court in Supremacy Clause cases, but rather exclusively through application of section 6(b) of the EPAA, 15 U.S.C. § 755(b). That section provides that:

> The regulation under section 753 of this title and any order issued thereunder, shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

Furthermore, defendants assert that the term "conflict" as used in section 6(b) is restricted to *actual* conflicts. Thus, according to defendants, the traditional judicial use of the term "conflict" as including instances where the consequences of a state law "sufficiently injure the objectives of the federal program," *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 583, 99 S. Ct. 802, 809, 59 L. Ed. 2d 1 (1979) is improper in these cases.

Defendants in asserting their position, rely on state court cases interpreting section 6(b) as well as a letter written by the Acting General Counsel of the DOE applying the actual conflict standard. Plaintiffs dispute the correctness of defendants' definition of "conflict" in section 6(b) and argue that, in

any event, the section does not constitute the sole test of pre-emption in these cases. The Court agrees.

Any possibility that the existence of a specific pre-emption provision in Federal legislation precludes application of the general pre-emption principles is quickly dispelled by the decision of the Supreme Court in *Jones* v. *Rath Packing Co.*, *supra*. The Court in *Jones*, after concluding that an express pre-emption provision did not invalidate a state law, found that the finding did not resolve the case because the Court still had to "determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* 430 U.S. at 540-541, 97 S. Ct. at 1317.

Defendants' reliance on *Governor of the State of Maryland* v. *Exxon*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd on other grounds*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) which found section 6(b) provided the sole test for pre-emption is misplaced, since that case was decided prior to *Jones* which dictates a contrary result.

Nor does the letter written by the Acting General Counsel for DOE in which he, relying exclusively on the section 6(b) pre-emption test, opined that the state anti-pass through provision did not conflict with the EPAA and its regulations, dictate a finding by this Court that section 6(b) provides the exclusive pre-emption test.[18] While interpretation of statute by the agency charged with its administration is "entitled to substantial deference," *Quern* v. *Mandley*, 436 U.S. 725, 738, 98 S. Ct. 2068, 2076, 56 L. Ed. 2d 658 (1978), it is clearly not decisive in every instance. The Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944), explained that:

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18 The letter was written by Eric J. Fygi, Acting General Counsel of the DOE on June 10, 1980, in response to a letter of the same date from the Governor of New York State, seeking an opinion as to whether the anti-pass through provision would conflict with the EPAA and the regulations promulgated thereunder.

Although section 6(b) was not specifically referred to, it is clear that it was relied upon exclusively by Mr. Fygi in reaching his determination.

> . . . rulings, interpretations and opinions of the Administrator under [an] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade if lacking power to control.* (Emphasis supplied)

Before applying the foregoing standard to the Acting General Counsel's letter in this case, it should be pointed out that the DOE itself places relatively little weight on communications of this type. The regulations at 10 C.F.R. §§ 205.80-.86 set forth the procedure for obtaining official DOE interpretations. Those procedures were not followed with regard to the opinion letter relied on by defendants in these cases. With respect to the type of opinion letter relied upon by the defendants herein, 10 C.F.R. § 205.80 provides that:

> Responses, which may include verbal or written responses to general inquiries or to other than formal written requests for interpretations filed with the General Counsel or his delegate or a Regional Counsel, *are not interpretations and merely provide general information.* (Emphasis supplied)

Under the *Skidmore* test, the opinion letter is entitled to little weight with regard to the pre-emption issue. After concluding that the anti-pass through provision was not pre-empted by Federal law, the author of the letter offered three caveats, one of which was that the time constraints he was under in responding to the request for an opinion, "did not permit an exhaustive analysis of the question." Thus, by his own admission, the Acting General Counsel's consideration of the pre-emption issue was less than thorough.

Furthermore, as shall be demonstrated at a later point, the conclusion reached in the letter is inconsistent with expressions

of agency policy contained in several earlier DOE administrative opinions. Finally, the Court is convinced that the conclusion in the letter was, in light of *Jones*, reached either without reference to, or through the incorrect application of, judicially determined pre-emption principles.

Thus, the plaintiffs are not limited to section 6(b) in pursuing their pre-emption claims but rather are free to rely upon both of the judicially accepted grounds for pre-emption as well. However, since the Court is of the opinion that the anti-pass through provision must be invalidated under the "conflict" standard, it will be unnecessary to determine whether Congress intended exclusive Federal control over the allocation and pricing of petroleum products, excluding the State from exercising its police power in those areas.[19]

The Pre-emption Conflict as to "Non-Exempt" Petroleum Products

As one of the sponsors of the EPAA, Senator Henry Jackson stressed that it was crucial that Congress "build a coordinated and rational fuels and energy policy." 119 Cong. Rec. 12317, *quoted in* S. Rep. No. 93-159, 93d Cong., 1st Sess. 21 (1973). Later, as floor manager of the bill, the Senator warned that:

> [I]f the Federal Government fails to establish effective regional or national allocation plans, we will invite piecemeal action by the States. Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level.

119 Cong. Rec. 17764 (1973).

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19 In keeping with the traditional judicial reluctance to find Federal pre-emption of a State's exercise of police power (*see Ray* v. *Atlantic Richfield Co.*, *supra*), the Court has attempted to make its finding of pre-emption in these cases on as narrow a ground as possible. In any event, the fact that Congress included an express pre-emption provision which did not result in occupation of the entire field, makes it unlikely that plaintiffs would be successful on that pre-emption ground.

Recognizing that the "self-regulating laws of supply and demand [were] not currently operating in the petroleum product market," the House Committee on Interstate and Foreign Commerce concluded that it was "imperative that the Federal government . . . accept its responsibility to intervene in these markets to preserve competition." H.R. Rep. No. 93-159, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News, 2586.

As previously noted, one of the express statutory objectives to be considered in the promulgation of mandatory allocation and price regulations was the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States. 15 U.S.C. § 753(b)(1)(f). Explaining the Congressional intent with regard to equitable prices, the Congressional conferees stated that:

> The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages. *On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government.* Most importantly, the President must, in exercising his authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs. (Emphasis supplied)

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Admin. News 2702-2703.

Thus, it is clear that Congress looked upon the EPAA as legislation directing the establishment of a flexible national program for dealing with what was hoped to be a temporary crisis in an equitable manner, providing to the greatest extent possible for a balancing of the interests of both consumers and refiners of petroleum products.

Plaintiffs[20] contend that the anti-pass through provision stands as an obstacle to the fulfillment of that Congressional goal and charge more specifically that the provision conflicts with the mandatory Federal price regulations by not allowing refiners and sellers of petroleum products to recapture increased costs engendered by state franchise taxes on a dollar-for-dollar basis.[21] According to plaintiffs, the New York gross receipts tax is a franchise tax which falls within that group of taxes which may under the regulations be passed on to purchasers of petroleum products through increase in prices. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The anti-pass through provision, however, prevents the plaintiffs from passing on that cost in the prices charged for products sold within New York State.

Thus, recovery of increased costs incurred as a result of the gross receipts tax will be limited to amounts which could be passed through to purchasers in other states. However, plaintiffs argue that under the Federal regulations they will not be able to recover the entire amount from out-of-state purchasers because of the equal application rule. 10 C.F.R. § 212.83(h). Under that rule, as previously explained, New York prices would be deemed to have increased in the same amount as those in other states, and that amount would be lost from plaintiffs' "banks" and unavailable for future recovery.

Defendants argue in response that (a) the New York gross receipts tax is not one which may be passed on to purchasers under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), and (b) the Federal price control regulations merely set "maximum allowable prices" and bestow no right upon refiners and sellers to charge

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20 Plaintiff NEPCO alleges in its complaint that its New York sales are limited to residual fuel oil, presently exempt from regulation under the EPAA. Therefore, the discussion concerning non-exempt products does not apply to NEPCO.

21 Plaintiffs in the Mobil Oil case allege in addition that the anti-pass through provision conflicts with the mandatory price regulations by imposing a sequence of cost recovery in conflict with the sequence set forth in the Federal regulations at 10 C.F.R. § 212.83(f). It will, however, be unnecessary for the Court to reach that argument.

those prices.[22] The Court finds both of these arguments unconvincing.

In asserting the position that the New York gross receipts tax is not one which can be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), defendants argue that the intent behind the regulation allowing the pass through of certain taxes (i.e., property, excise, franchise and similar taxes) while not permitting the pass through of income taxes was to distinguish between those taxes which the taxing authority expected to be passed on and those which were to be born by the taxpayer. Defendants then reason that the regulation should, therefore, be read as a presumption to operate only in the absence of an explicit expression of intention. Defendants, however, fail to offer support for this theory.

Defendants also seem to suggest that the gross receipts tax, because it taxes *all* receipts and not merely receipts from sales, is actually along the lines of an income tax, and cannot be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) on that basis.[23] Neither is this claim convincing, especially in light

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22 Defendants also renew the argument first made in conjunction with the motion to dismiss that the anti-pass through provision is not a price control measure because although it admittedly has an incidental effect on price, it does not "fix" prices. Rather, defendants claim it is a "rule of tax incidence," and as such should not be pre-empted by Federal law in this instance.

The Court remains convinced that regardless of the terminology employed by defendants, the anti-pass through provision is indeed a price control measure. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223, 60 S. Ct. 811, 844, 84 L. Ed. 1129 (1940) (finding that under the Sherman Antitrust Act price fixing is not limited to the setting of uniform or inflexible prices); *Perez* v. *Campbell*, *supra*, 402 U.S. at 651-652, 91 S. Ct. at 1712 (pre-emption is not determined by reference to state statutory labels).

The anti-pass through, regardless of what defendants call it, "distorts market conditions by keeping prices artificially low in [New York]." *See Mobil Oil v. Dubno*, *supra*, Slip op. at 19 n. 10.

23 Defendants recognize that no deductions are allowed as they generally are with an income tax, but in support of their argument that the gross receipts tax is an income tax, justify the failure to allow deductions by the low tax rate.

of the following statutory language contained in the tax legislation:

> § 182 Additional *franchise tax* on certain oil companies. 1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company . . . *for the privilege of exercising its corporate franchise*. . . . (Emphasis supplied)

L. 1980, ch. 271, § 4.

The foregoing language establishes to the satisfaction of this Court that the gross receipts tax is a state franchise tax which falls within that group of taxes which may be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7).[24]

Defendants argue, however, that even if the regulation allows plaintiffs to increase prices of non-exempt petroleum products to reflect costs incurred by the New York gross receipts tax, it does not give them an absolute right to do so. Rather, according to defendants, the regulations merely establish "maximum allowable prices," and, therefore, no conflict is presented by the State's setting more restrictive price limitations. Defendants' position simply does not hold up under scrutiny.

As previously noted, Congress, in directing the President to promulgate mandatory allocation and price regulations under the EPAA, provided him with guidelines in the form of a list of objectives to be met to the "maximum extent practicable." 15 U.S.C. § 753(b)(1)(A)-(I). Therefore, in determining whether

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24 Defendants point out that 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) allows only taxes which are attributable to refining operations to be passed through. Since the New York gross receipts tax taxes all of an oil company's receipts, and not just those attributable to refining operations, defendants suggest that there is a material issue of fact precluding summary judgment as to what portion, if any, of the gross receipts tax can be passed through as attributable to refining operations.

The Court, however, does not agree that this question raises a material issue of fact. Even if oil companies could not pass through all of the costs incurred through the tax, any proportion allocatable to refining (and clearly some portion would be) which could be passed through but for the anti-pass through provision presents a conflict problem.

the anti-pass through provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Ray* v. *Atlantic Richfield Co.*, *supra*, the Court must look not only at particularly the regulation but at the objectives which the agency sought to further by its promulgation.[25] If the consequences of the anti-pass through provision "sufficiently injure the objectives of the federal program," *Hisquierdo* v. *Hisquierdo*, *supra*, a conflict must be found and the provision invalidated under the Supremacy Clause. Such a conflict exists in this instance with regard to non-exempt petroleum products.

The regulations involved in plaintiffs' pre-emption challenge are 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) and the equal application rule. 10 C.F.R. § 212.83(h). One of the objectives at 15 U.S.C. § 753(b)(1), the "preservation of an economically sound and competitive petroleum industry," [15 U.S.C. § 753(b)(1)(D)] is furthered by allowing refiners to pass through those taxes which are recognized as costs of doing business. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). By precluding the pass through of the New York gross receipts tax to purchasers in New York, the anti-pass through provision conflicts with the articulated policy allowing the pass through, and the more general Congressional intent that prices for petroleum products "be set . . . pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government." H.R. Conf. Rep. No. 93-628 *supra*.

Another of the objectives, set forth at 15 U.S.C. § 753(b)(1)(F), provides for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States." The equal application rule exists to help insure equitable pricing on a national basis.

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25 Referring to the objectives set forth at 15 U.S.C. § 753(b)(1), the Temporary Emergency Court of Appeals in *Mobil Oil* v. *Department of Energy*, 610 F.2d 796 (Temp. Emer. Ct. of Ap. 1979) explained that:

> No single factor is inherently more important than any of the other factors. Instead, as this Court has held, all nine factors are to be balanced objectively.

The application of the rule, and the detrimental effect that it would have on the oil companies' ability to increase prices on a dollar-for-dollar basis to cover costs incurred through the imposition of the New York gross receipts tax have already been explained.[26]

However, perhaps even more crucial than the harm which would be done to plaintiffs through application of the rule, which in itself suggests an impermissible conflict, is the fact that the anti-pass through provision flies in the face of the specific Congressional objective which the equal application rule was enacted to further. While the Federal policy supports "equitable distribution" and "equitable prices" among "all regions and areas of the United States," 15 U.S.C. § 753(b)(1)(F), New York is seeking to insulate its citizens from increased costs resulting from a local tax while allowing the burden of the tax to fall upon the shoulders of non-New Yorkers.[27]

Such a result frustrates not only express Congressional policy, but thwarts the articulated DOE policy of waiving the equal application rule and allowing local taxes to be passed through solely to customers within the taxing jurisdiction. In

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26 Defendants suggest that there is no conflict in these cases with regard to the equal application rule because plaintiffs presently have "banks" which are so large that it is unlikely they will be depleted by the time price controls expire in September of 1981, and the only material aspect of the rule is to reduce those "banks."

While defendants assert that the size of plaintiffs' "banks" raises a material issue of fact, the Court once again disagrees. The conflict exists regardless of the size of plaintiffs' "banks."

27 Defendants attempt to differentiate the New York gross receipts tax from other gross receipts taxes which have been imposed on oil companies primarily because it taxes *all* receipts from *all* sources. L. 1980, ch. 271 § 4.

However, the tax is limited through the application of a statutory formula to the portion of receipts allocated to the State of New York, making it, in effect, a local tax. The fact that it applies to all sources of income rather than only receipts from the sale of petroleum products suggests only that there will conceivably be sources of income upon which the tax must be paid but which will be unrelated to the EPAA or the mandatory price regulations.

Mobil Petroleum Company, 5 DOE § 81, 188 at 82, 989 (1977) the DOE found that a Guam gross receipts tax could be recovered solely in the taxing jurisdiction, reasoning that:

> [I]f Mobil Petroleum were required to recover a portion of the Guam gross receipts tax by increasing its prices for covered products sold to purchasers outside the territory of Guam, those non-Guamanian purchasers would in effect be required to bear a portion of the burden of a Guamian tax on Guamian consumption of petroleum products. *This result would frustrate one of the objectives that Congress sought to further in the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, that of providing for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States."* (citation omitted)

Because the anti-pass through provision conflicts in the manner discussed with 10 C.F.R. §§ 212.83(c)(2)(iii)(E)(7) and 212.83(h), as well as the aforementioned objectives at 15 U.S.C. § 753(b)(1)(D) and (F) and the Congressional intent as expressed in the legislative history, its validity cannot be upheld under the Supremacy Clause with regard to petroleum products presently subject to the mandatory price controls.[28]

The Pre-emption Conflict as to "Exempt" Petroleum Products

As already pointed out, the 1975 amendment to the EPAA gave the President, or his delegate, the authority to exempt

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28 Although compliance with the mandatory price control regulations and the anti-pass through provision would not be impossible so as to create an *actual* conflict under 15 U.S.C. § 755(6), as defendants suggest that section should be read, the anti-pass through provision would be pre-empted under that section by use of the judicially accepted definition of conflict in pre-emption cases.

The section refers only to programs "for the allocation of . . . petroleum products." However, legislative history suggests and defendants agree that programs for the pricing of petroleum products would be included.

petroleum products from regulation in accordance with the procedures contained in 15 U.S.C. § 760a. Many of the petroleum products subject to the New York gross receipts tax are presently exempt from regulation. As also previously noted, plaintiffs claim that the anti-pass through provision passed in conjunction with that tax is pre-empted as to those exempt products because it conflicts with the Federal regulatory policy under the EPAA.

An almost identical pre-emption issue was recently before the District Court in Connecticut in *Mobil Oil* v. *Dubno*, *supra*. The State of Connecticut enacted legislation imposing on oil companies a two percent tax on their gross receipts from sales in Connecticut. Section 13(a) of the Connecticut legislation contained a statement that the intent of the legislation was that the tax would constitute a part of each company's operating overhead. Section 13(b) forbids companies from raising wholesale prices in Connecticut on petroleum products presently exempt from regulation, by any higher amount than the average amount by which it raises prices "in all ports on the eastern coast of the United States." *Id.*, Slip op. at 2-3.

Judge Blumenfeld found that section 13(b) was a price control mechanism which frustrated the effectiveness of Federal law in a number of ways. He proceeded to declare the section unconstitutional as in violation of the Supremacy Clause.

There are obvious differences in the legislation, although none quite so drastic as defendants would have the Court believe. In fact, the Court sees none which in itself would dictate a contrary result in this action. If anything, the New York anti-pass through constitutes an even more imposing price control regulation in that it applies to both exempt and non-exempt petroleum products and, in addition, attempts to totally insulate New York from any of the burden of the tax, thus creating the possibility for even more severe market distortion than with the Connecticut case.

The decision in *Mobil Oil Corp.* v. *Dubno*, was reached after a thorough analysis of the legislative history of the EPAA, the statutory language, and the regulations themselves. As dis-

cussed below, this Court believes that the decision in *Dubno* is correct, and that Judge Blumenfeld's analysis is for the most part applicable in these cases.

Plaintiffs in these actions argue that in choosing to exempt certain petroleum products from price control regulations, the DOE (or predecessor agency) did not intend to cease regulating with regard to those products,[29] thereby presumably leaving the area wide open for the imposition of state regulation. Instead, plaintiffs contend, the Federal authorities have " 'addressed and acted upon the question,' " and after giving " 'careful consideration' to factors specified by Congress, they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals." *Mobil Oil Corp.* v. *Dubno*, *supra*, Slip op. at 13, *quoting in part from Ray* v. *Atlantic Richfield Co.*, *supra*.

Furthermore, plaintiffs assert, allowing operation of the anti-pass through provision would frustrate the satisfaction of the objectives set forth in the EPAA at 15 U.S.C. § 753(b)(1). There is ample support for plaintiffs' position in the legislative history of the Act, the statutory language and the manner in which the regulations have been converted to standby status with the DOE maintaining a close watch over supply and market conditions.

When enactment of the EPAA was originally being considered by Congress, the Committee conferees noted that:

> The committee recognizes that [price controls] necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of [EPAA] objectives.

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29 Plaintiffs in the Mobil Oil case rely for support on the decision in *Consumers Union of U.S., Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975) (en banc), in which a regulation which directed that prices be allowed to be determined by free market was still classified by the Court as a regulation within section 4(a) of the EPAA.

H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess. 24 (1973). Thus, it is clear that Congress considered price controls a necessary (but hopefully temporary) evil.

While the EPAA was enacted as a temporary measure to deal with a crisis situation during discussions, in 1975, concerning the enactment of the Energy Policy and Conservation Act (EPCA), Publ. L. No. 94-163, 89 Stat. 871 (1975), Congress recognized that:

> The fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations. *The Arab embargo raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level.* (Emphasis supplied)

H.R. Rep. No. 94-340, 94th Cong., 1st Sess., *reprinted in* [1975] U.S. Code Cong. & Admin. News 1963.

The recognition on the part of Congress that the United States was entering a new era with regard to energy resources which necessitated a national energy policy belies defendants' argument that the 1975 amendment to the EPAA signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products.

While defendants correctly point out that in amending the EPAA in 1975, Congress intended "a gradual return to an unregulated market," S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 203 (1975), the return to a petroleum market totally unfettered by Federal controls has not yet occurred even as to exempt products.

Just as the price control regulations themselves must provide for the satisfaction of the objectives set forth at 15 U.S.C. § 753(b)(1), any decision to exempt a product from the regulations must likewise be based upon "a finding that such amendment is consistent with the attainment of the objectives specified in section 753(b)(1) . . . ," 15 U.S.C. § 760a(d)(1). Therefore, exempting a product from the price control regulations,

rather than constituting an end to Federal regulation over those products, represents an affirmative administrative determination that "no such regulation is appropriate . . . pursuant to the policy of the statute . . . ," *Ray* v. *Atlantic Richfield Co., supra. See also Mobil Oil Co.* v. *Dubno, supra.*

Furthermore, agency action taken thus far under 15 U.S.C. § 760a has reflected a cautious, watchful approach to deregulation. As previously noted, price control regulations formerly applicable to presently exempt products have not been repealed but put on standby status to allow quick reactivation if necessary. In addition, the DOE has continued to closely monitor the market situation with regard to the exempt products.[30] This Court is not required to, nor is it in a position to, make a finding as to when, if ever, a return to an unregulated market will occur. It may be on September 30, 1981, the date presently set for expiration of Federal price controls. 15 U.S.C. § 760g. Then again, in light of the Congressional recognition that the United States has entered a "new era" necessitating "policy decisions [with regard to energy resources] at the national level," H.R. Rep. No. 94-340, *supra*, Federal control may extend far beyond that date.

In any event, at the present time, regulatory control over even the exempt petroleum products is, as previously demonstrated, still substantial. As with the Connecticut price control legislation, the anti-pass through provision in the New York gross receipts tax "frustrates the full effectiveness" of the present Federal regulatory policy under the EPAA in several ways.

Aside from imposing price controls in an area which Federal authorities have determined should be free of price regulation, the anti-pass through provision conflicts with the objectives which the Federal agencies were obligated to consider in making decisions to deregulate. Just as was recognized in *Mobil Oil Co.* v. *Dubno, supra*, Slip op. at 21:

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30 For example, a public hearing was scheduled in 1977 on the need for a price monitoring system for middle distillates. Such a system was adopted. 42 Fed. Reg. 54444 (Oct. 6, 1977).

> preventing suppliers from fully recovering, through prices charged in [New York], the true economic cost of products sold in [New York] . . . will induce suppliers to sell their products in other states, risking the very "supply problems" and "market distortions," the DOE in removing controls, endeavored to eliminate.

The provision presents a serious threat to the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States," 15 U.S.C. § 753(b)(1)(F), and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the EPAA. *Ray* v. *Atlantic Richfield Co., supra.*[31]

Because the anti-pass through provision conflicts with the Federal policy under the EPAA with regard to presently exempt petroleum products in the foregoing manner, its validity cannot be upheld under the Supremacy Clause.

RELIEF

This Memorandum-Decision explains the reasoning behind the September 4, 1980, Order of this Court, denying defendants' motion to dismiss and granting plaintiffs' motions for summary judgment declaring the anti-pass through provision of the New York gross receipts tax unconstitutional as in violation of the Supremacy Clause and enjoining its enforcement. The Court by this Memorandum-Decision reaffirms its findings as contained in the September 4, 1980, Order and hereby incorporates this Decision therewith.

IT IS SO ORDERED.

/s/ NEAL P. MCCURN
U.S. District Judge

Dated: September 19, 1981
Syracuse, New York

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31 Also relevant in this regard is the DOE policy favoring recovery of increased costs engendered from local taxes of the type involved herein, solely from purchasers in the taxing jurisdiction. *Mobil Petroleum Co., supra.* New York State seeks the exact opposite result.

Order of the United States District Court for the Northern District of New York in *Mobil Oil Corp., et al.* v. *Tully, et al.*, *New England Petroleum Corp.* v. *Tully, et al.*, and *Amerada Hess Corp.* v. *Tully, et al.*, Nos. 80 Civ. 543, 80 Civ. 544, 80 Civ. 570—September 4, 1980.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, UNITED REFINING COMPANY, INC. and GULF OIL COMPANY,

Plaintiffs,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants.

AMERADA HESS CORPORATION,

Plaintiff,

—v.—

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants.

ORDER

Defendants have moved for an order dismissing these three actions for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341. Plaintiffs in each action have moved for an order granting summary judgment in their favor. The Court has concluded after full hearing and after consideration of the arguments of counsel on both motions, the memoranda submitted therewith, both in support and opposition, and the exhibits attached thereto, that the defendants' motion to dismiss should be denied and that plaintiffs' motions for summary judgment should be granted and has further concluded that in the interests of judicial economy and in fairness to the litigants, this Order should be issued forthwith with a Memorandum-Decision containing the Court's findings of fact and conclusions of law to follow, as to avoid the need for the hearing scheduled for September 10, 1980, on plaintiff New England Petroleum Corporation's application for a preliminary injunction with a consolidated hearing on the merits. It is therefore

ORDERED, ADJUDGED AND DECREED that:

1. The defendants' motion to dismiss the plaintiffs' complaints in these three actions is denied;

2. The plaintiffs' motion for summary judgment (a) declaring the anti-pass through provision of section 182(12)(a) of the New York Tax Law as added by L. 1980 ch. 271 § 4, and ch. 272, § 2, invalid as pre-empted by the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751-760h and the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, promulgated thereunder and thus void under the Supremacy Clause of the United States Constitution and (b) enjoining defendants, their delegates and successors in office from enforcing the anti-pass through provision against plaintiffs in these actions, are granted;

3. Entry of judgment in these actions is hereby stayed until September 17, 1980, and in the event that a Memorandum-Decision has not been issued by the Court by that time, the Court shall, upon notice to the parties, extend the stay until such time as a decision is issued and the defendants have had a reasonable time to seek a further stay from the United States Court of Appeals for the Second Circuit.

IT IS SO ORDERED.

/s/ Neal P. McCurn
U.S. District Judge

DATED: September 4, 1980
Syracuse, New York

CONSTITUTIONAL PROVISION

U.S. Const., Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES AND REGULATIONS

Economic Stabilization Act of 1970, *reprinted in* the notes following 12 U.S.C. § 1904

"§ 201. *Short title*

"This title may be cited as the 'Economic Stabilization Act of 1970'.

* * *

"§ 209. *Injunctions and other relief*

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§ 210. *Suits for damages or other relief*

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

* * *

"§ *211. Judicial review*

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the

determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

* * *

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court,

Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, *as amended by* the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163 (1975), 15 U.S.C. § 751 *et seq.*

§ 753. *Mandatory allocation*

Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products

(a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

* * *

§ 754. *Administration and enforcement; delegation of authority; civil and criminal penalties*

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973)

shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212 (b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

§ 755. *Impact on other laws*

* * *

Preemption of State or local allocation regulations and orders

(b) The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

* * *

§ 760g. Conversion date of Presidential authority from mandatory to discretionary to promulgate, etc., regulation; termination date of Presidential authority limitations; expiration date of Presidential authority to promulgate, etc., regulation or issue order; effect on pending actions

Notwithstanding any other provision of this chapter, at midnight on the conclusion of the 40th month in which the amendment under section 757(a) of this title is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 753(a) of this title shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 753(b)(2), 757 and 758 of this title shall terminate. The author-

ity to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

Tax Injunction Act, 28 U.S.C. § 1341

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

June 25, 1948, c. 646, 62 Stat. 932.

Petroleum Price Regulations, 10 C.F.R. § 212.83

§ 212.83 *Price rule.*

(a) *General rule.* (1) *Rule.* A refiner may not charge to any class of purchaser a price for a covered product in excess of the maximum allowable price except as provided in paragraph (a)(4) of this section.

* * *

§ 212.83(c)(2)(iii)(E)

* * *

$E_n{}^t$ is the total increased non-product costs (excluding marketing cost increase, which is included in "$F_1{}^t$") of the type "n" incurred during the period "t"; provided that such costs are included only to the extent that such costs are attributable to refining operations during the period "t" under the generally accepted accounting practices historically and consistently applied by the firm concerned or as otherwise provided in this § 212.83(c)(2) (iii)(E) and are not included in computing May 15, 1973 prices or in computing increased product costs.

* * *

(7) *Federal, state and local tax cost increase.*

(i) Federal, state and local tax cost increase is computed by applying the formula for "E_nT" above. For purposes of this computation "C" refers to the dollar amount of federal, state, and local property, excise, franchise and other similar taxes incurred. Federal, state, and local income taxes are not includible in this amount.

NEW YORK STATUTE

New York L. 1980, chs. 271, 272*

CHAPTER 271

An Act to amend the state finance law, in relation to establishing the regional transportation operating and capital assistance fund; to amend the tax law, in relation to imposition of an additional franchise tax on certain companies and providing for the deposit of revenues collected thereby; to amend the energy law, in relation to making certain conforming changes therein and making an appropriation from the regional transportation operating and capital assistance fund for the purpose of supplementing payments for operating assistance.

Approved June 13, 1980, effective as provided in section 12.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The state finance law is amended by adding a new section seventy-two-a to read as follows:

§ *72-a. Regional transportation operating and capital assistance fund*

1. There is hereby established in the joint custody of the commissioner of taxation and finance and the state comptroller a special fund to be known as the "regional transportation operating and capital assistance fund".

2. Moneys in the regional transportation operating and capital assistance fund shall be kept separately from and shall not be commingled with any other moneys in the joint or sole

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* Changes or additions in text are indicated by *italics* and deletions are indicated by ~~strikeouts~~.

custody of the state comptroller or the commissioner of taxation and finance.

3. Moneys of the fund, following appropriation by the legislature, shall be allocated upon the certification of approval of availability by the director of the budget solely for the transportation operating and capital assistance purposes set forth within the specific accounts contained within the fund established by this section.

4. The regional transportation operating and capital assistance fund shall consist of separate and distinct accounts one of which shall be known as the "statewide mass transportation operating assistance account". Moneys in the account shall be kept separately from and not commingled with any other moneys in the regional transportation operating and capital assistance fund.

5. The statewide mass transportation operating assistance account shall consist of the revenues required to be deposited therein pursuant to the provisions of section one hundred eighty-two of the tax law and all other moneys credited or transferred thereto from any other fund or source pursuant to law.

6. Moneys in the statewide mass transportation operating assistance account shall be paid on a quarterly basis or in such other manner and at such times as the commissioner of transportation with the approval of the director of the budget may provide in accordance with a schedule as specified by appropriation for the payment of operating costs of public mass transportation systems within the state.

7. Any such moneys in the regional transportation operating and capital assistance fund and in any of the accounts in such fund may, at the discretion of the state comptroller, be invested in securities and obligations as defined by section ninety-eight of this chapter.

8. No municipality receiving funds hereunder shall utilize such funds for all or any part of the local share for state

financed and administered programs that require such a local share.

§ 2. Section one hundred seventy-one-a of the tax law, as added by chapter sixty-nine of the laws of nineteen hundred seventy-eight, is amended to read as follows:

§ 171-a *Deposit and disposition of revenue*

All taxes, interest, penalties and fees collected or received by the tax commission under articles nine (*except section one hundred eighty-two thereof*), nine-a, nine-b, nine-c, ten-c, twelve-a, thirteen, sixteen, sixteen-a, eighteen, twenty, twenty-one, twenty-two, twenty-three, twenty-six, twenty-six-a, twenty-eight, thirty-one, thirty-two, and thirty-three of this chapter shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under such articles of this chapter, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds or reimbursements under such articles of this chapter and article ten thereof out of which amount the comptroller shall pay any refunds or reimbursements to which taxpayers shall be entitled under the provisions of such articles of this chapter and article ten thereof. The tax commission and the comptroller shall maintain a system of accounts showing the amount of revenue collected or received from each of the taxes imposed by such articles. The comptroller, after reserving the amount to pay such refunds or reimbursements shall, on or before the tenth day of each month, pay into the state treasury to the credit of the general fund all revenue deposited under this section during the preceding calendar month and remaining to his credit on the last day of such preceding month.

3. Such law is amended by adding a new section one hundred eighty-two to read as follows:

§ 182. *Additional franchise tax on certain oil companies*

1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the state as hereinafter provided, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its taxable years. In no event shall the tax imposed by this section be less than two hundred fifty dollars.

2. As used in this section: (a) The term "oil company" means every corporation formed for or engaged in the business of importing or causing to be imported into this state for sale in this state, extracting, producing, refining, manufacturing, compounding or selling petroleum. However, a corporation which is neither formed for nor engaged in the business of extracting, producing, refining, manufacturing or compounding petroleum but is solely engaged in the business of selling petroleum (whether imported or not) or other products or services and has sold in this state sixty million gallons or less of petroleum during its immediately preceding taxable year applicable under the tax imposed on it by article nine or nine-a of this chapter (or reasonably expects such sales in its current taxable year if such taxable year is the corporation's first taxable year applicable under the tax imposed on it by article nine or nine-a of this chapter) shall not be considered an oil company. Provided, further, a corporation which is principally engaged in selling fuel oil (excluding diesel motor fuel) used for residential purposes shall not be considered an oil company. For purposes of this section, petroleum shall include, but shall not be limited to, gasoline, aviation fuel, kerosene, diesel

motor fuel, benzol, distillate fuels, residual oil, crude oil or any similar product.

(b) The term "gross receipts" means all receipts, whether from within or without the United States, whether in cash, credits or property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expense whatsoever but excluding such receipts which constitute consideration received by the oil company for the issuance or sale of shares of its capital stock or money lent to such company. Receipts received by reason of any sale of fuel oil (excluding diesel motor fuel) used for residential purposes shall not be included in gross receipts. Provided, however, gross receipts shall not include the receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section. It shall be presumed that no receipts are receipts from a sale for resale to such purchaser unless such purchaser furnishes the oil company with a resale certificate in such form and under such terms and conditions as the tax commission may prescribe and such certificate is accepted in good faith by such oil company.

(c) The term "corporation" includes a corporation, joint stock company or association and any business conducted by a trustee or trustees wherein interest ownership is evidenced by certificate or other written instrument.

(d) The term "taxable year" means the oil company's taxable year for federal income tax purposes, or the part thereof during which such oil company is subject to tax under this section.

3. The portion of the gross receipts of an oil company to be allocated within the state shall be determined as follows: multiply its gross receipts by an allocation percentage to be determined by ascertaining the percentage which the receipts of such oil company, computed on the cash or accrual basis according to the method of accounting used in the computation of its gross receipts, arising during the period covered by

its report from (a) sales of its tangible personal property where shipments are made to points within this state, (b) services performed within the state, (c) rentals from property situated, and royalties from the use of patents or copyrights, within the state, and (d) all other business receipts earned within the state, bear to the total amount of the oil company's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and all other business transactions, whether within or without the state. Receipts received by reason of any sale of fuel oil used for residential purposes shall be included as a receipt in the computation of the allocation percentage.

4. Every oil company subject to tax under this section shall keep such records of its business in such form as the tax commission may require, and such records shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer.

5. Every oil company subject to tax hereunder shall annually file on or before the fifteenth day of the third month following the close of its taxable year a return which shall state the gross receipts for the period covered by such return. Returns shall be filed with the tax commission in a form prescribed by it setting forth such information as the tax commission may prescribe. Every oil company subject to tax hereunder which ceases to exercise its franchise or to be subject to the tax imposed by this section shall transmit to the tax commission a return on the date of such cessation or at such other time as the tax commission may require covering each year or period for which no return was theretofore filed. Notwithstanding the foregoing provisions of this subdivision, the tax commission may require any oil company to file an annual return, which shall contain any data specified by it, regardless of whether the oil company is subject to tax under this section.

6. At the time of filing the return required by this section, each oil company shall pay to the tax commission the tax

imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed (determined without regard to any extension of time for filing the return). For provisions relating to payment of tax where there have been payments of estimated tax, the provisions of subdivision four of section one hundred ninety-seven of this chapter shall be applicable.

7. If any provision of this section conflicts with any other provision contained in this article, the provisions of this section shall control, but the provisions of this article which do not conflict with the provisions of this section shall apply with respect to the taxes under this section, insofar as they are, or may be made, applicable.

8. Any corporation which is subject to tax under section one hundred eighty-three, one hundred eighty-four, one hundred eighty-five, one hundred eighty-six or one-hundred eighty-six-a of this chapter shall not be subject to tax under this section.

9. An oil company which is not incorporated or organized under the laws of this state shall not be deemed to be doing business, employing capital, owning or leasing property, or maintaining an office in this state, for the purposes of this section, by reason of (a) the maintenance of cash balances with banks or trust companies in this state, or (b) the ownership of shares of stock or securities kept in this state, if kept in a safe deposit box, safe, vault or other receptacle rented for the purpose, or if pledged as collateral security, or if deposited with one or more banks or trust companies, or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (c) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such oil company, or (d) the maintenance of an office in this state by one or more officers or directors of the oil company who are not employees of the oil company if the company otherwise is not doing business in this state, and does not employ capital or

own or lease property in this state, or (e) the keeping of books or records of an oil company in this state if such books or records are not kept by employees of such oil company and such oil company does not otherwise do business, employ capital, own or lease property or maintain an office in this state, or (f) any combination of the foregoing activities.

10. Any receiver, referee, trustee, assignee or other fiduciary, or any officer or agent appointed by any court, who conducts the business of any oil company shall be subject to the tax imposed by this section in the same manner and to the same extent as if the business were conducted by the agents or officers of such oil company. A dissolved oil company which continues to conduct business shall also be subject to the tax imposed by this section.

11. Where a false or fraudulent resale certificate has been furnished to an oil company, the corporation furnishing such certificate shall be subject to a penalty equal to three per centum of the gross receipts which would have otherwise been taxable to such oil company if such certificate had not been furnished to such company. Such penalty shall be assessed, collected and paid in the same manner as the addition to tax with respect to a deficiency due to fraud provided for in subsection (c) of section one thousand eighty-five of this chapter is assessed, collected and paid.

12. (a) The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state. In addition to the return required to be filed pursuant to subdivision five of this section, every oil company subject to tax under this section shall file, at the time such return is required to be filed (without regard to extensions), a report with the commissioner of taxation and finance certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state the tax imposed by this section and any penalty which may be assessed under this subdivision. However, if an oil company

was not subject to tax under this section for the preceding taxable year, if any, such company shall file at the time the return is required to be filed pursuant to subdivision five of this section (without regard to any extensions), a report with such commissioner certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state for the period beginning one month after the date this section became law and ending on the last date of its current taxable year, what the tax liability of such company would have been under this section for the preceding taxable year, computed as if such company were subject to such tax. The report to be filed with such commissioner shall be certified, under oath, by a person specified in section one hundred ninety-four of this article. In no event shall the tax imposed under this section or any penalty which may be assessed under this subdivision be separately stated or charged on bills rendered by the oil company to its customers or others located in this state.

(b)(1) If an oil company fails to file a report with the commissioner of taxation and finance as required by paragraph (a) of this subdivision, or files such report after the time prescribed therefor, there shall be imposed by such commissioner for each day of such failure or late filing, a penalty equal to one per centum of the tax imposed under this section for the taxable year to which such report relates. A report filed without the required certification shall be deemed not to have been filed.

(2) If the commissioner of taxation and finance determines that an oil company has violated any of the provisions of paragraph (a) of this subdivision, there shall be imposed by such commissioner a penalty equal to one hundred per centum of the tax imposed under this section for the taxable year during which such violation occurred.

(c) The penalties referred to in paragraph (b) of this subdivision shall be imposed after the commissioner of taxation and finance has rendered a final determination. A final determination may be issued only after the oil company has received a

notice of proposed penalty and has had an opportunity to protest such proposed penalty in a hearing before such commissioner. The notice of proposed penalty must be issued by such commissioner within the following time periods:

(1) where there has been a failure to file a report or where a false or fraudulent report has been filed or where there has been a wilful violation of paragraph (a) of this subdivision with intent to evade the requirements of this paragraph, at any time;

(2) where there has been a late filing of a report, within three years of the filing of the report;

(3) where there has been any violation of any provision of paragraph (a) of this subdivision, within three years of the filing of the report covering the period during which the violation occurred.

(d) Within ninety days after the mailing of the notice of proposed penalty, or one hundred fifty days if the notice is mailed to an address outside the United States, an oil company may file a petition with the commissioner of taxation and finance protesting the proposed penalty: In any hearing before such commissioner, the burden of proof shall be upon the oil company. The assessment of the tax imposed by this section pursuant to article twenty-seven of this chapter shall govern for purposes of such hearing before such commissioner and such assessment is not subject to attack, collateral or otherwise, in such hearing.

(e) Any penalty which is assessed against an oil company pursuant to this subdivision and which has become final shall be paid to the state tax commission, as provided in such assessment, and shall be collected by such commission in the same manner as the tax imposed by this section. A penalty becomes final at the expiration of the time for administrative or judicial review.

(f) The commissioner of taxation and finance shall take testimony and proofs under oath, with reference to any matter within the line of his official duty under this subdivision. A deputy commissioner and such other officials and employees

of the department of taxation and finance, as may be nominated by such commissioner by resolution, may be designated for the purpose of taking such testimony and proofs and a deputy commissioner or other official or employee so nominated may be designated by such commissioner for the purpose of holding any hearing authorized or required under the provisions of this subdivision.

(g) The commissioner of taxation and finance, his agents, deputies, and any other officer or employee of the department of taxation and finance, shall have power to administer oaths, take affidavits and certify acknowledgements in relation to any matter or proceeding in the exercise of the powers or duties of the commissioner under this section and in relation to any written instrument required or permitted to be filed with the commissioner. The commissioner shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct, and to examine them in relation to any matter which he has power to investigate and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance. A subpoena issued under this section shall be regulated by the civil practice law and rules. Such commissioner shall also have the power to require an oil company to submit information in any form which he deems necessary in order to carry out the intent of this subdivision.

(h) Any report required by this subdivision to be filed with the commissioner of taxation and finance shall not be considered to be a report for purposes of any other section of this chapter.

13. All taxes, interest and penalties collected or received by the tax commission under the taxes imposed by this section shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comp-

troller shall require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this section, out of which amount the comptroller shall pay any refunds to which oil companies shall be entitled under the provisions of this section. After reserving the amount required to pay such refunds, the comptroller shall deposit weekly all remaining revenue in the regional transportation operating and capital assistance fund, established by section seventy-two-a of the state finance law, to the credit of the statewide mass transportation operating assistance account therein.

§ 4. Section one hundred ninety-seven of such law, as amended by chapter six hundred thirteen of the laws of nineteen hundred seventy-six, is amended to read as follows:

§ 197. *Payment of tax and penalties*

1. All taxes and fees imposed by this article which are payable to the tax commission shall be due and payable at the time of filing the report required by section *one hundred eighty-two* or one hundred ninety-two of this chapter, or, in case such report is not filed when due, on the last day specified for the filing thereof.

2. Where an application for consent to dissolution, as provided by section one thousand four of the business corporation law, is filed with the tax commission prior to the commencement of any tax year or period, by a corporation subject to tax under articles nine or nine-a of this chapter, such corporation shall not be liable for any tax imposed by said articles for such following year or period (except as may be otherwise provided in section one hundred ninety-one, *subdivision ten of section one hundred eighty-two* and subdivision three of section two hundred nine of this chapter), provided that the certificate of dissolution for such corporation is duly filed in the office of the secretary of state within sixty days after the commencement of such tax year or period and such corporation does not conduct business in such tax year or period.

3. Notwithstanding any other provision of this article, the tax commission may grant a reasonable extension of time for payment of any tax or fee imposed by this article under such conditions as it deems just and proper.

§ 5. Subdivision one of section one hundred ninety-seven-a of such law, as amended by chapter one hundred seventy-four of the laws of nineteen hundred seventy-seven, is amended to read as follows:

1. Every taxpayer subject to the taxes imposed under *sections one hundred eighty-two*, one hundred eighty-four, one hundred eighty-six and one hundred eighty-six-a of this chapter shall make a declaration of its estimated tax for the current taxable year, containing such information as the tax commission may prescribe by regulations or instructions, if such estimated tax can reasonably be expected to exceed one thousand dollars.

§ 6. Section one hundred ninety-seven-a of such law is amended by adding a new subdivision six to read as follows:

6. *This section shall apply to taxable periods of twelve months other than a calendar year by the substitution of the months of such fiscal year for the corresponding months specified in this section.*

§ 7. Paragraph (a) of subdivision one of section one hundred ninety-seven-b of such law, as amended by chapter one hundred seventy-four of the laws of nineteen hundred seventy-seven, is amended to read as follows:

(a) For taxable years beginning on or after January first, nineteen hundred seventy-seven, every taxpayer subject to tax under *section one hundred eighty-two*, one hundred eighty-four, one hundred eighty-six, or one hundred eighty-six-a, shall pay in each such year an amount equal to twenty-five percent of the tax imposed under each of such sections for the preceding taxable year, if such preceding year's tax exceeded one thousand dollars. Such amount shall be paid with the

return or report required to be filed with respect to such tax for such preceding taxable year or with an application for extension of the time for filing such return or report.

§ 8. Section one hundred ninety-seven-b of such law is amended by adding a new subdivision nine to read as follows:

9. The provisions of this section shall apply to taxable periods of twelve months other than a calendar year by the substitution of the months of such fiscal year for the corresponding months specified in such provisions.

§ 9. Subdivision twelve of section 5-105 of the energy law, as amended by chapter eight hundred twenty of the laws of nineteen hundred seventy-six, is amended to read as follows:

12. To assist the attorney general *and the commissioner of taxation and finance* in protecting consumers from abuses in the distribution, sale, handling or transport of energy, energy resources, and energy related devices, installations, and technologies, including the charging of any illegal price or the violation of any state or federal law or regulation.

§ 10. [Appropriation].

§ 11. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall affect, impair and invalidate the remainder of this act; provided further, however, that the provisions of this act shall not become operative unless and until this state is granted specific authorization to prohibit a "pass through" as provided in subdivision twelve of section one hundred eighty-two of the tax law, as added by section three of this act by a rule or regulation of the federal department or agency; by executive order of the President of the United States; or by act of Congress.

§ 12. This act shall take effect immediately, provided, however, that section three hereof, relating to imposition of a gross receipts tax on oil companies, shall apply to taxable years ending on or after the date on which this act shall have become

a law; sections five, six, seven and eight hereof, relating to such imposition, shall take effect sixty days after the date on which this act shall have become a law.

CHAPTER 272

An Act to amend a chapter of the laws of nineteen hundred eighty as proposed by legislative bill number S. 10188 amending the state finance law relating to establishing the regional transportation operating and capital assistance fund, in relation to a statement of legislative findings and declaration of purpose and making certain technical changes within such chapter and to repeal section twelve of such chapter relating thereto and to amend the tax law, in relation to making certain other technical changes.

Approved June 18, 1980, effective as provided in section 8.

Passed on message of necessity. See Const. art. IX, Section 2(b)(2), and McKinney's Legislative Law Section 44.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Sections one through twelve of a chapter of the laws of nineteen hundred eighty, as proposed by legislative bill number S. 10188 amending the state finance law relating to establishing the regional transportation operating and capital assistance fund, are renumbered to be sections two through thirteen and a new section one is added to read as follows:

Section 1. Statement of legislative findings; declaration of purpose. It is hereby found that public transportation constitutes an irreplaceable segment of the state transportation network which serves all citizens of the state. The viability of public transportation within the statewide transportation network must be maintained in order to provide adequate service to the millions of state citizens who daily rely upon it.

Currently, New York's public transportation system faces a severe financial problem which has reached emergency proportions since the proper financing of public transportation systems in this state is beyond the parameters of the existing state budget and beyond the capabilities of the fare box. Public transportation systems, once an asset, threaten to become a liability.

It is also found that oil companies are currently reaping historically high profits. These increased profits do not result from the application of normal management techniques and strategies which any business uses to maximize profits, but rather result from the market conditions prevailing within the international oil industry, which are artificially inflating the price of petroleum products. In view of the high cost of petroleum, the importance of energy conservation and New York's dependence upon foreign energy suppliers, oil companies have become businesses clothed with a public interest.

It is further found that the economic recession which is currently putting severe pressure on consumers in New York state and the entire nation results in good part from the high price of petroleum products. A cycle is created in which petroleum price increases contribute to growing inflation, which in turn stimulates economic recession.

The current economic recession has the most severe impact on those at the end of the economic spectrum least able to absorb the impact of inflation and most dependent upon mass transit. The same inflationary cycle that necessitates increased monies to maintain the mass transit system also reduces the ability of mass transit users to provide new revenue through major fare increases. It is, therefore, found that providing significant new revenues through major fare increases would have an overall negative impact on the state's economy by imposing a greater financial burden upon those who can least afford it.

It is therefore declared to be the purpose of this act that new funds to aid mass transit shall be provided in a manner that will not contribute to the inflationary spiral. The vast amounts

of petroleum products which are used to transport vital goods and to enable utilities and public transportation systems to provide necessary services indicate that the very well-being of the citizens of this state is directly affected by the price of petroleum. The cost of all petroleum products is high and increasing every day, as evidenced by successive Organization of Petroleum Exporting Countries (OPEC) price increases. It is in the clear public interest to do nothing that will contribute to further increases in the price of petroleum products to consumers.

Accordingly, the legislature hereby determines and declares that it is the public policy of the state to tax the gross receipts of oil companies and, at the same time, to prevent such gross receipts tax from fueling inflation by prohibiting the pass through of such tax to the consumers of this state.

Therefore, it is the intent of the legislature that the gross receipts tax shall cease and terminate if such tax shall be permitted, either by judicial adjudication or by any formal opinion or ruling or in any other manner, to be included either directly or indirectly in the sales price of the products of the oil company.

§ 2. Subdivisions six, eight and thirteen of section one hundred eighty-two of the tax law, as added by such chapter, are amended to read as follows:

6. At the time of filing the return required by this section, each oil company shall pay to the tax commission the tax imposed by this section for the period covered by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed (determined without regard to any extension of time for filing the return). For provisions relating to payment of tax where there have been payments of estimated tax, the provisions of subdivision four of section ~~one hundred ninety-seven~~ *one hundred ninety-seven-b* of this chapter shall be applicable.

8. Any corporation which is subject to tax under section one hundred eighty-three, one hundred eighty-four, one hundred

eighty-five, *or* one hundred eighty-six ~~or one hundred eighty-six-a~~ of this chapter shall not be subject to tax under this section.

13. All taxes, interest and penalties collected or received by the tax commission under the taxes *and penalties* imposed by this section shall be deposited daily in one account with such responsible banks, banking houses or trust companies as may be designated by the comptroller, to the credit of the comptroller. Such an account may be established in one or more of such depositories. Such deposits shall be kept separate and apart from all other money in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this section, out of which amount the comptroller shall pay any refunds to which oil companies shall be entitled under the provisions of this section. After reserving the amount required to pay such refunds, the comptroller shall deposit weekly all remaining revenue in the regional transportation operating and capital assistance fund, established by section seventy-two-a of the state finance law, to the credit of the statewide mass transportation operating assistance account therein.

§ 3. Subdivision one of section one hundred ninety-seven of such law, as amended by such chapter, is amended to read as follows:

1. All taxes and fees imposed by this article which are payable to the tax commission shall be due and payable at the time of filing the report required by section ~~one hundred eighty-two or~~ one hundred ninety-two of this chapter, or, in case such report is not filed when due, on the last day specified for the filing thereof.

§ 4. The first undesignated paragraph of section eleven of a chapter of the laws of nineteen hundred eighty, as proposed by legislative bill number S. 10188 amending the state finance law

relating to establishing the regional transportation operating and capital assistance fund, such section as renumbered by section one of this act, is amended to read as follows:

The sum of two hundred thirty-five million dollars ($235,000,000), or so much thereof as may be available and necessary, is hereby appropriated from the statewide mass transportation operating assistance account of the regional transportation operating and capital assistance fund created pursuant to section seventy-two-a of the state finance law, as added by section ~~one~~ *two* of this act to the department of transportation to supplement the payment of mass transportation operating assistance for the period April first, nineteen hundred eighty, to March thirty-first, nineteen hundred eighty-one, in accordance with the following schedule.

5. Section twelve of such chapter, as renumbered by section one of this act, is repealed and a new section twelve is added to read as follows:

§ 12. (a) If the provisions of paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, as added by section four of this act, prohibiting the inclusion of the tax imposed by this act, directly or indirectly, in the sales price of its products sold in this state by the oil company upon which such tax has been imposed is: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect on the date provided for in subdivision (d) of this section.

(b) Notwithstanding the provisions of subdivision (a) hereof, if, during the judicial or administrative process referred to therein, the court of original instance or any appellate court issues any order, judgment, injunction or stay prohibiting the state of New York from enforcing the provisions of said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, then and in such event, this act shall cease to be in force and effect on the date provided for in subdivision (d) of this section.

(c) If this act ceases to be in force and effect pursuant to the provisions of subdivision (b) hereof and thereafter a court of final appellate review adjudicates the provisions of paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law to be valid, then the provisions of this act shall become operative and be in full force and effect on the tenth day following the entry of the order of remittitur of such appellate court to the court of original instance.

(d) In the event that the provisions of this act shall cease to be in force and effect pursuant to the provisions of either subdivision (a) or (b) of this section, the effective date of such cessation shall be the tenth day after the effective date of (i) the order or judgement, or formal opinion or ruling holding said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law invalid, or (ii) the order, judgment, injunction or stay prohibiting the state of New York from enforcing the provisions of said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, provided, however, that such tax shall continue in full force and effect until such day and all filings of returns and payment of taxes, interest and penalties otherwise required by this act for all periods prior to the cessation of such act shall be timely made and may be enforced as fully and to the same extent as if such act had continued in effect.

(e) If the taxable year of an oil company subject to the tax imposed by such section one hundred eighty-two of the tax law would otherwise have ended subsequent to the date the provi-

sions of this act shall cease to be in force and effect pursuant to the provisions of either subdivision (a) or (b) of this section, then such oil company shall, nevertheless, be subject to the tax for such taxable year, except that such taxable year shall end on the day this act shall cease to be in force and effect.

(f) Any appeal taken within the unified court system of this state from an order, decision or adjudication which prohibits the inclusion of the tax imposed by this act, directly or indirectly, in the sales price of its products sold in this state by an oil company upon which such tax has been imposed shall have preference over all other causes and shall be placed at the head of the calendar of the appellate court in which the appeal is being heard. Such appellate court shall hear arguments on such matter within ten days after the filing of notice of appeal and shall thereafter decide such matter promptly. In the event such court is not in session at the time of the filing of the notice of appeal such court shall convene to hear and decide such appeal within the time limitations set forth in this subdivision.

§ 6. Section thirteen of such chapter, as renumbered by section one of this act is renumbered section fifteen and sections thirteen and fourteen are added to read as follows:

§ 13. Subparagraph four of paragraph (b) of subdivision nine of section two hundred eight of the tax law, as amended by chapter seven hundred thirteen of the laws of nineteen hundred sixty-one, is amended to read as follows:

(4) taxes imposed under this article *and section one hundred eighty-two of this chapter,*

§ 14. (a) The provisions of chapter fifty-seven of the laws of nineteen hundred eighty shall not apply to the tax imposed under section one hundred eighty-two of the tax law and, notwithstanding the provisions of subdivision three of section one hundred ninety-seven-a and of subdivision two of section one hundred ninety-seven-b of the tax law, a declaration of estimated tax for taxable years commencing on or after January first, nineteen hundred eighty and ending before January

first, nineteen hundred eighty-one, with respect to the tax imposed under such section one hundred eighty-two, shall be filed on or before October fifteenth of such year and the estimated tax, with respect to which such declaration is required to be filed, shall be paid in two equal installments as follows: October fifteenth of such year and the next January fifteenth.

(b) For the taxable years or periods ending June thirtieth, nineteen hundred eighty, the payments provided for in subdivision six of section one hundred eighty-two of the tax law and in paragraph (a) of subdivision one of section one hundred ninety-seven-b of the tax law equal to twenty-five percent of the tax imposed by such section one hundred eighty-two for the preceding taxable year, if such preceding year's tax exceeded one thousand dollars, shall be due October fifteenth, nineteen hundred eighty rather than September fifteenth, nineteen hundred eighty.

§ 7. Section fifteen of such chapter, as renumbered by sections one and six of this act, is amended to read as follows:

§ 15. This act shall take effect immediately; provided, however, that section ~~three~~ *four* hereof, relating to imposition of a gross receipts tax on oil companies, shall apply to taxable years ending on or after the date on which this act shall have become a law; ~~sections five, six, seven and eight hereof, relating to such imposition, shall take effect sixty days after the date on which this act shall become a law~~.

§ 8. This act shall take effect upon the same date as such chapter of the laws of nineteen hundred eighty takes effect.

Letter from Eric J. Fygi, Acting General Counsel of the Department of Energy, to the Honorable Hugh L. Carey, Governor of the State of New York—June 10, 1980

Department of Energy
Washington, D. C. 20585

June 10, 1980

Honorable Hugh L. Carey
Governor of New York
Executive Chamber
Albany, New York 12224

Dear Governor Carey:

Secretary Duncan has asked that I respond to your letter of June 10 in which you requested our opinion as to whether aspects of Assembly Bill No. 10609 would be contrary to the Emergency Petroleum Allocation Act of 1973, as amended, or the regulations promulgated by this Department and its predecessors to administer that statute. Your inquiry is, as I understand it, directed to that aspect of the bill ". . . which would make unlawful (under State law) the inclusion by an oil company in the sale price of petroleum sold in (New York) State of an additional gross receipts tax on oil companies, . . ." which tax would be imposed by Assembly Bill No. 10609.

I have reviewed the memorandum you submitted that was prepared by Mr. Saul Heckelman, and I concur with its conclusion that the anti-passthrough provision of this bill would not, if enacted, conflict either with the Emergency Petroleum Allocation Act or with its implementing regulations. The Emergency Petroleum Allocation Act itself displaces State law only to the extent that that statute or its implementing regulations "conflict" with State law, and thus the Allocation Act does not occupy the entire field of petroleum regulation.

The regulations themselves adopt a permissive approach with respect to the passthrough of certain product and nonproduct costs by petroleum refiners and marketers, but the regulatory scheme implementing the Allocation Act mandates neither minimum costs for covered products nor the passthrough of qualified increased costs.

In conclusion I must offer three caveats. First, the time within which I was advised you required a response to this question did not permit the exhaustive analysis of the question you posed. Second, this view of the legal question on which you have requested our advice is not intended to intimate any view of the merits, as a matter of policy, of State statutes intended to impose additional taxes on petroleum refining and marketing activities occurring within the respective States. Finally, the fact that the current regulations under the Emergency Petroleum Allocation Act do not prohibit the provision in Assembly Bill No. 10609 should not be interpreted to suggest that subsequent regulations could not prohibit such a provision.

Sincerely,

/s/ Eric J. Fygi

Eric J. Fygi
Acting General Counsel

Letter from Robert Weeks, Executive Vice President, Marketing and Refining Division, of Mobil Oil Corporation, to John C. Sawhill, Deputy Secretary of Energy—May 16, 1980

May 16, 1980

Hon. John C. Sawhill
Deputy Secretary of Energy
Forestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Sawhill:

We believe the Department of Energy should be concerned with the State of Connecticut's recent enactment of a so-called "gross earnings" tax levied upon the sale of petroleum products by refiners in that state. Both the legislative hearings during which this tax was considered and the final form of the tax itself suggest that Connecticut is attempting to take advantage of DOE regulations and rulings to transfer the burden or a tax based upon Connecticut consumption to out-of-state consumers.

Our concern is further amplified by the fact that other states such as New York, Rhode Island, etc., are considering similar tax proposals.

The Connecticut law provides as follows:

> "Any petroleum company which is engaged primarily in the refining and distribution of petroleum products and distributes such products to wholesale and retail dealers for marketing and distribution in this state shall pay a quarterly tax at the rate of two per cent of gross earnings in each taxable quarter derived by such company from the sale of petroleum products in this state."

Taking advantage of the "equal application" rule (10 C.F.R. 212.83[h[) and the DOE's decision in *State or Oregon* (2 FEA Section 80.616 [1975]), Connecticut also included the following provision with the intent of preventing refiners from passing the tax on gasoline sales entirely through to their Connecticut customers:

> "It is not the intention of the general assembly that the tax imposed under section 1 of this act be construed as a tax upon purchasers of petroleum products, but that such tax shall be levied upon and be collectible from petroleum companies as defined in said section 1, and that such tax shall constitute a part of the operating overhead of such companies."

To prevent the pass through of the tax on the sale of so-called "exempt" petroleum products, the Connecticut law provides:

> "No petroleum company subject to the tax imposed under section 1 of this act shall raise its posted wholesale rack price in Connecticut for any petroleum product exempt from the federal Emergency Petroleum Allocation Act (P.L. 93-159) by an amount higher than the average amount by which such company raises its wholesale rack price for such product in all ports on the eastern coast of the United States."

While state taxation may not generally be of concern to the DOE, we believe action on your part is warranted where a state has so blatantly attempted to use and take advantage of DOE regulations and rulings to transfer to non-Connecticut consumers the burden of Connecticut taxes.

Notwithstanding Connecticut's attempt to disguise the true nature of this tax, it is in effect a wholesale sales tax similar to a percentage motor fuel exercise tax. We believe DOE should take the position that this tax is a cost uniquely associated with the sale of petroleum products in Connecticut as a sales tax. In

the alternative, DOE could act favorably upon requests for exception relief from the equal application rule.

As to Section 13(b) of the Connecticut law dealing with decontrolled products, we believe their attempt to regulate the price of these products is clearly preempted by the Emergency Petroleum Allocation Act. The fact that the price of these products is not controlled at this time does not mean they are not subject to control. In fact, the decision by DOE to remove controls from certain products places Connecticut's action in direct control with federal law and policy.

Because the Connecticut tax could serve as a precedent to other states, we believe it is important for DOE to take a position on the concerns expressed in this letter.

I would appreciate a meeting with you to discuss these concerns further.

Very truly yours,

/s/ROBERT G. WEEKS

Robert G. Weeks

Letter from Lynn R. Coleman, General Counsel of the Department of Energy, to Robert Weeks, Executive Vice President, Marketing and Refining Division, of Mobil Oil Corporation—July 1, 1980

Mr. Robert Weeks
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017 July 1, 1980

Dear Mr. Weeks:

This is in response to your letter to the Deputy Secretary regarding the State of Connecticut's "gross earnings" tax.

You are correct that generally this Department does not become involved in matters of State taxation of petroleum products.

Any attempt by a State in structuring its tax to capitalize upon a particular regulatory provision in our price regulations is not likely to be ultimately successful. Not only will all the price regulations expire by October 1981, but also the life of any particular regulatory provision may well be shorter. Indeed, the Economic Regulatory Administration has just proposed elimination of the equal application rule, which would eliminate the proscription against oil companies passing allowable tax costs through where they are incurred.

We do not agree with your contention that Section 13(b) of the Connecticut law is preempted by the Emergency Petroleum Allocation Act (EPAA). By its terms that section only applies to petroleum products "exempt" from the EPAA, which we take to mean currently decontrolled under that Act. We do not read the EPAA as preempting the entire field of price and allocation regulaton of crude oil and petroleum products. Rather the Federal regulations supersede State law only where there is a legal conflict between them.

Sincerely,

/s/ Lynn R. Coleman

Lynn R. Coleman
General Counsel

Excerpt from Affidavit of Norman Goldberg, Senior Vice President, Marketing, of Amerada Hess Corporation—August 5, 1980

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

Docket No. 80-CV-570 (NPM)

AMERADA HESS CORPORATION,

Plaintiff,

v.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, constituting the NEW YORK STATE TAX COMMISSION ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK; and JAMES L. LaROCCA, COMMISSIONER OF THE NEW YORK STATE ENERGY OFFICE,

Defendants.

AFFIDAVIT IN SUPPORT OF AMERADA HESS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY }
COUNTY OF MIDDLESEX } ss.:

NORMAN GOLDBERG, being duly sworn, deposes and says:

* * *

6. There are approximately 50 companies which distribute petroleum products in competition with Hess in states outside New York, but which—unlike Hess—do not do business in New York and are thus not subject to New York's additional franchise tax. In my judgment, because of (a) the intense competition which Hess faces in the markets in which it sells its petroleum products, and (b) the fact that Hess competes against companies outside of New York which do not do business in New York, it is highly unlikely that Hess will be able to recoup the full cost of New York's additional franchise tax by raising its petroleum product prices to customers outside of New York. If Hess were to attempt to do so in any substantial degree, it would be placed at a serious price disadvantage vis-a-vis those competitors which do not do business in New York (and thus do not have New York's franchise tax as an added element of their costs), thereby causing Hess to lose customers and sales.

/s/ Norman Goldberg

Sworn to before me this
5th day of August, 1980

/s/ Lucille E. Rodecker

No. 81-96

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

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SUPPLEMENTAL BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

Defendants-appellants ("the State") submit this supplemental brief, pursuant to Rule 16.6 of the Rules of this Court, to call attention to intervening matter not available at the time of our last filing. On August 28, 1981, plaintiff-appellee New England Petroleum Corp. ("Nepco") filed a Memorandum of Law in support of a motion for summary judgment on three causes of action in its state court action. *New England Petroleum Corp.* v. *State of New York*, Index No. 2913-91 (Sup. Ct. Albany Co.).* That Memorandum directly supports, and is in fact explicitly based on, arguments that the State has made throughout the actions at bar, that were rejected by the lower courts, and that the State believes should be given plenary review by this Court.

Thus, the Nepco Memorandum, p. 32, declares: "Obviously, the [New York] tax . . . is 'in the nature of an income tax' " (quoting with approval a brief filed in this action for two of the defendants; footnote omitted). The basis of this statement is that the statute bars the company from treating the tax "as a cost of sales which the taxpayer was entitled to recover in the sales price," *id.* at 30:

> "The tax imposed by the New Tax Act [1980 N.Y. Laws, chs. 271, 272] is, and was intended to be a tax on perceived wealth, profits or income, not a tax on gross receipts. The anti-pass through feature produces—and was intended to produce—that operation and effect."

Id. at 36; *accord*, *id.* at 33-34.

Nepco argues that the New York tax, being in the nature of an income tax, is arbitrary and capricious because it presumes

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* The state court denied a previous motion by Nepco for summary judgment, on its other causes of action, on July 15, 1981.

irrebuttably that the oil companies have made profits bearing some correlation to their gross receipts. That argument is not at issue here; the State will demonstrate in the state court action that the New York law fits well within its broad powers of taxation.

What is significant for present purposes is that in a related litigation Nepco, one of the appellees here, has adopted arguments that we have made throughout this litigation and that justify plenary review of the TECA judgment. First, as we have pointed out, Jurisdictional Statement at 26, the now-revoked federal regulations, 10 C.F.R. § 217.83(c)(2)(iii)(E)(7), Apdx. 80a, "specifically barred passthrough of income taxes, which states intend to be absorbed by the taxpayer." Nepco itself has now stated that New York's tax "is in the nature of an income tax" because New York intended the tax, like an income tax, to be absorbed by the taxpaying oil companies. The federal regulations themselves, therefore, arguably prohibited passthrough of New York's tax. And even if the regulations did not affirmatively prohibit the passthrough, they certainly did not authorize oil companies, in derogation of state law, to pass through a tax that shares a primary characteristic of an income tax.

Second, Nepco has in effect conceded that the passthrough prohibition of New York's tax statute should not be viewed as a price regulation but as a rule of tax incidence. Nepco recognizes that the passthrough prohibition makes New York's tax comparable to an income tax, and that the prohibition "produces—and was intended to produce—[the] operation and effect" of causing the oil companies themselves to absorb the tax. *Id.* at 36. This is simply another way of stating our point: the prohibition is a rule of tax incidence, not a price regulation. Indeed, in support of its argument that the New York tax is "in the nature of an income tax," Nepco's Memorandum, p. 31, cites our contention in the instant action "that the anti-passthrough provision is merely a rule of 'tax incidence' to require that oil companies bear the tax."

As we have pointed out in our Jurisdictional Statement at 13-15, this point has broad significance for the preemption issue as it relates to both regulated and nonregulated products* and also for the issue of federal jurisdiction.

In short, Nepco's position in the related state court litigation highlights important errors made by TECA. It is difficult to see how, in light of that position, it can seriously be denied that this case, which is of such great public importance, presents substantial questions calling for plenary review by this Court.

Respectfully submitted,

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September 15, 1981

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* Even if the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 *et seq.* preempted state power to regulate petroleum prices, that preemption could not extend to a law that might affect prices indirectly only by imposing a rule of tax incidence, *see* Jurisdictional Statement at 24, 26.

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No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees.

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—against—

AMERADA HESS CORPORATION,

Plaintiff-Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

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No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Plaintiffs-Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Defendants-Appellants,

—against—

AMERADA HESS CORPORATION,

Plaintiff-Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Defendants-Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, plaintiffs-appellees ("appellees") respectfully move for an order dismissing the appeal of defendants-appellants, the members of the New York State Tax Commission, New York's Attorney General and its Energy Commissioner (collectively "the State"), because no appeal to this Court lies from decisions of the Temporary Emergency Court of Appeals ("TECA").[1] If that motion is granted and the State's Jurisdictional Statement is considered as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, appellees submit that the petition should be denied. Should appellees' motion to dismiss be denied, appellees move alternatively for an order affirming the decision below because the questions presented are so insubstantial as to require no further argument.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear an appeal from a decision of TECA when Congress has only provided for review of that court's decisions by writ of certiorari?

2. Whether the effect of the Tax Injunction Act (28 U.S.C. § 1341) on the district court's jurisdiction may be raised as an issue in an appeal from a decision of TECA when TECA never decided the issue and this Court declined to review the same issue when it was presented in appellants' petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit?

3. If review of the Second Circuit's decision is now proper, whether the Tax Injunction Act divests the federal courts of jurisdiction to adjudicate the constitutionality of a state price regulation when (a) appellees did not seek to

1. Filed herewith under separate cover is a bound appendix listing, pursuant to Sup. Ct. R. 28.1, all parent companies, subsidiaries, except those which are wholly owned, and affiliates of each corporate appellee.

"enjoin, suspend, or restrain the assessment, levy or collection" of any tax; (b) the only arguable interference with the assessment, levy or collection of a state tax is the result of the State's calculated decision to link the survival of its tax to the validity of its price regulation; and (c) the federal district courts had exclusive jurisdiction over appellees' preemption claim?

4. Whether a state statute regulating the price of petroleum products which the federal government has determined should be free from price regulation is preempted by the federal statute and regulations embodying that determination?

5. Whether a state statute prohibiting recovery of an increased tax cost in New York conflicts with federal price regulations expressly authorizing such recovery?

STATEMENT OF THE CASE

In June 1980 the State of New York enacted a new franchise tax intended to finance the operating deficits of New York's mass transit system. The legal incidence of this tax was placed upon oil companies operating in New York. The State, however, went one step further. Rather than allow the economic burden of that tax to be determined by the interaction of free market forces and the federal regulations then in effect, the State entered the field of petroleum product price regulation. That price regulation, known as the anti-passthrough provision, prohibits firms from including the tax in the sales prices of their products sold in New York, thus insulating New York's citizens from the cost of operating its mass transit system.

In July 1980 appellees commenced these actions in the United States District Court for the Northern District of New York challenging the anti-passthrough provision and alleging, *inter alia*, that it conflicts with the federal Emergency Petroleum Allocation Act ("EPAA"), as amended, 15 U.S.C. §§ 751-760h, and the Mandatory Petroleum Price

Regulations, 10 C.F.R. Part 212, and is thus preempted pursuant to the Supremacy Clause of the United States Constitution.[2] On September 4, 1980, the district court (McCurn, J.) issued an order denying the State's motion to dismiss under the Tax Injunction Act and granting summary judgment in favor of appellees on the ground that the anti-passthrough provision was preempted by the EPAA and pertinent price regulations. A. 67a.[3] The reasoning underlying these conclusions was set forth in a Memorandum Opinion and Order issued on September 19, 1980, when judgment in appellees' favor was entered. A. 28a.

The State first appealed to the United States Court of Appeals for the Second Circuit. There, in addition to contesting the merits of the district court's preemption decision, the State contended that the district court lacked jurisdiction on the theory that appellees' challenge to the anti-passthrough provision was an action to stay or enjoin the collection of the New York tax within the meaning of the Tax Injunction Act. On January 28, 1981, a unanimous panel of the Second Circuit recognized that the anti-passthrough provision was an exercise of "a police power affecting the price structure of petroleum products" and that appellees had not sought a federal ruling invalidating the tax itself. A. 26a. Accordingly, the court held that the challenge to the State's restraint on appellees' pricing freedom was within the district court's jurisdiction. A. 16a.

Further recognizing that the preemption issue adjudicated by the district court presented an EPAA question which was within TECA's exclusive appellate jurisdiction, the Second Circuit dismissed that portion of the State's appeal. *Id.* The State thereupon pursued an appeal of the

2. Appellees also challenged the anti-passthrough provision under the Commerce and Due Process Clauses of the United States Constitution. In light of the district court's disposition, these claims were never reached below.

3. "A" references are to the Appendix to appellants' Jurisdictional Statement ("Juris. St.").

district court's preemption ruling to TECA. No issue was raised in TECA as to the jurisdiction of that court, or the district court, to adjudicate the controversy. Instead, while its appeal on the merits was pending before TECA, the State petitioned for certiorari, requesting this Court to review the Second Circuit's jurisdictional decision under the Tax Injunction Act. TECA's opinion affirming the district court's preemption decision was issued on June 15, 1981. A. 1a. On June 23, 1981, this Court denied the State's petition for a writ of certiorari to the Second Circuit. 49 U.S.L.W. 3954 (No. 80-1864).

A. The Federal Regulatory Program

The EPAA was enacted in 1973 in response to the national energy crisis created by the Arab oil embargo of 1973 and ensuing petroleum product shortages. 15 U.S.C. § 751(a)(3). Recognizing that the "threat to the public health, safety and welfare [could] be averted or minimized most efficiently and effectively through prompt action by the Executive Branch of [the federal] government," *id.*, Congress required the President to promulgate a regulation providing for the allocation and pricing of crude oil, residual fuel oil and refined petroleum products. 15 U.S.C. § 753(a). Rather than give the President free reign in developing that program, Congress required him to promulgate regulations which further nine specified national policy objectives "to the maximum extent practicable." 15 U.S.C. § 753(b)(1).

Those objectives are at times inconsistent and represent competing interests.[4] Thus, their furtherance "'to the maximum extent practicable,' [requires] . . . a 'balancing'

4. They include "protection of public health . . . safety and welfare, . . . and the national defense; maintenance of all public services . . . including transportation facilities and services which serve the public at large . . .; preservation of an economically sound and competitive petroleum industry . . .; equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States . . .;

approach to achieve maximization of the legislative goals." *Consumers Union of United States, Inc. v. Sawhill,* 525 F.2d 1068, 1073 (TECA 1975). The purpose of that balancing approach is more than consumer protection.[5] It is instead "[m]ost importantly [to] strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2688, 2703.

The President's delegates balanced those objectives by developing price regulations which limited the price which could be charged each class of purchaser to the sum of May 15, 1973 prices plus certain specified categories of increased costs. State and local franchise tax cost increases initially were not among the specified costs which refiners were authorized to recover. In 1977, however, the federal agency[6] amended the regulations to authorize recovery of increases in those costs, finding that this would further the accomplishment of the nine EPAA policy objectives to the maximum extent practicable. 10 C.F.R. § 212.83(c)(2)-(iii)(E)(7), 42 Fed. Reg. 5023 (Jan. 27, 1977). That amendment authorized appellees to recover all their increased franchise tax costs from all of their customers, including those who purchase petroleum products in New York.[7]

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economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." 15 U.S.C. 753(b)(1).

5. In striking the requisite balance, "[n]o single factor is inherently more important than any of the other factors. Instead . . . all nine factors are to be balanced objectively." *Mobil Oil Corp. v. Department of Energy,* 610 F.2d 796, 801 (TECA 1979), *cert. denied,* 446 U.S. 937 (1980).

6. At that time, the agency was the Federal Energy Administration, a predecessor of the present Department of Energy ("DOE").

7. When presented with a new four percent Guamanian gross receipts tax, the DOE suspended the operation of certain price regulations which would have required the tax to be passed through largely outside Guam. It concluded that requiring non-Guamanian consumers to pay a tax

The statute authorizes the President to delegate his EPAA authority to both state and federal officials. 15 U.S.C. § 754(b). Each chief executive, however, has recognized the need for a uniform national balance of the EPAA objectives and has delegated virtually all EPAA authority to federal officials and none to any state or local government. Congress itself recognized the paramount need for a coordinated national energy policy by providing that any state regulation in conflict with the EPAA regulations is preempted. 15 U.S.C. § 755(b).

As initially enacted, the EPAA required the President to subject all products within the scope of the EPAA to the mandatory allocation and price regulations. In 1975, Congress recognized that its 1973 belief that the OPEC cartel would be short-lived was inaccurate and found that the nation had entered a "new era" requiring "policy decisions at a national level." H.R. Rep. No. 340, 94th Cong., 1st Sess. 1, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS, 1762, 1763. It therefore extended the EPAA, amending the act to permit the President to exempt particular products from the price and allocation controls. The purpose of that exemption authority was to effect a gradual decontrol of petroleum product prices in favor of the market mechanism as the method of counteracting OPEC's impact. S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 1956, 2045. To ensure that any exemption was consistent with the EPAA objectives, Congress only permitted the President to make such an exemption after he determined

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imposed on Guamanian consumption of petroleum products "would frustrate one of the objectives that Congress sought to further in the [EPAA], that of providing for the 'equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States.'" *Mobil Petroleum Co.*, 5 DOE ¶ 81,188 at p. 82,989 (1980). The intent of the taxing state is irrelevant to that policy. In response to a similar Connecticut tax, which the legislature did not want to be passed through, the DOE suspended the regulations so that any passthrough would take place in that state. *Amerada Hess Corp.*, DOE Case No. BEE-1310 (Sept. 24, 1980), *finalized*, 7 DOE ¶ 81,068 (1980).

> that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section [4(b)(1)] *and* that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

15 U.S.C. § 760a(b) (emphasis added).

When New York enacted the anti-passthrough provision, only gasoline, propane and certain natural gas liquids remained subject to the price and allocation regulations. The other petroleum products had been exempted by the President's delegates upon findings that those actions would achieve, to the maximum extent practicable, the EPAA objectives.[8]

In one of the first acts of the present administration, President Reagan took a further step toward adopting the market mechanism to counteract OPEC's impact by exercising his EPAA authority to decontrol the products which remained subject to the detailed price regulations. In doing so he declared that "[p]rice controls have . . . made us more energy-dependent on the OPEC nations" and concluded that "ending price controls is a positive first step towards a balanced energy program — a program free of arbitrary counterproductive constraints, one designed to promote prudent conservation and vigorous domestic production." Decontrol of Oil, Statement by The President on Signing Exec. Order 12287, 17 WEEKLY COMP. OF PRES. DOC. 53 (January 28, 1981). Completing the implementation of its decontrol decision, Congress legislated September 30, 1981 as the expiration date of the President's standby authority to reimpose controls.

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8. For example, in one of the first exemption decisions, the Federal Energy Administration made its affirmative intentions unambiguous by concluding that "the proposed exemption [was] necessary to the attainment of . . . EPAA objectives." 41 Fed. Reg. 17513 (April 26, 1976).

B. The New York Statute

On June 18, 1980, New York enacted two bills establishing its plan to raise funds for New York City's mass transit system. 1980 N.Y. Laws, chs. 271 & 272, A. 81a-102a. That legislation creates a new section 182 of the New York Tax Law which imposes an additional franchise tax on oil companies equal to two percent of their gross receipts allocable to New York. N.Y. Tax Law § 182(1), A. 84a. Subsection 12 of the new section 182 attempts to insulate New York residents from the normal economic consequences of the tax and the cost of the mass transit services they use by regulating the prices of firms subject to the tax. The anti-passthrough provision thus provides:

> The tax imposed . . . shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y. Tax Law § 182(12)(a), 1980 N.Y. Laws, ch. 271, § 4, A. 88a. This provision is supplemented by a requirement that firms certify under oath that they have not included the tax in the prices of their products sold in New York. *Id.* The act subjects a firm to substantial penalties if the Tax Commissioner determines that it has not complied with the anti-passthrough provision.

The anti-passthrough provision is not a revenue raising device. Rather, the express legislative objective is to control oil company prices so as "to do nothing that will contribute to further *increases in the price of petroleum products* to [New York] consumers" and "to prevent such gross receipts tax from *fueling inflation* by prohibiting the pass through of such tax to the consumers of this state." 1980 N.Y. Laws, ch. 272, § 1 (emphasis added), A. 95a-97a. What is more, New York deliberately determined that if it could not control the oil companies' prices, it would forego the gross receipts tax entirely. Thus, the legislature included a

"self-destruct" clause, which provides that if the anti-passthrough prohibition is held to be invalid, the tax itself "shall cease to be in force and effect" ten days thereafter. 1980 N.Y. Laws, ch. 271, § 12, A. 99a-101a. The only effect of the anti-passthrough provision on revenue is through the operation of this non-severability provision — in other words, the calculated decision of the legislature to link the continued existence of the tax to the validity of the anti-passthrough provision.

ARGUMENT

I

THIS COURT ONLY HAS JURISDICTION TO REVIEW TECA'S PREEMPTION DECISION BY WRIT OF CERTIORARI, NOT BY APPEAL

The Constitution provides that, in all cases within the judicial power of the United States other than those within the Supreme Court's original jurisdiction, the Court "shall have appellate jurisdiction, both as to law and fact, with such exceptions and such regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2. It has long been established that Congress exercises its right to make exceptions to the Court's jurisdiction by affirmatively describing that jurisdiction. By making such an affirmative grant, Congress, by negative implication, forecloses any jurisdiction not described. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).[9]

Congress provided that the Court may review TECA's decisions through § 211(g) of the Economic Stabilization

9. *Accord*, *Maynard v. Hecht*, 151 U.S. 324, 325 (1894); *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 620 (1875); *Merrill v. Petty*, 83 U.S. (16 Wall.) 338, 346 (1873); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810); *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805).

Act of 1970 ("ESA"), 12 U.S.C. § 1904 note,[10] which provides:

> Within thirty days after entry of *any judgment* by [TECA], a petition for a writ of certiorari may be filed in the Supreme Court of the United States and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in [28 U.S.C. § 1254].

Id. (emphasis added). By providing solely for review by certiorari within 30 days of "entry of any judgment by [TECA]," Congress eliminated the possibility of review of TECA decisions by appeal. *Ex parte McCardle, supra; Durousseau v. United States, supra.*

The State does not attempt to support its assertion of appeal jurisdiction by reference to ESA § 211(g), the only section that refers specifically to TECA's decisions. Rather, the State relies on 28 U.S.C. § 1254(2), even though that section only provides that

> [c]ases in the *courts of appeals* may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States.

28 U.S.C. § 1254(2) (emphasis added). Since that section only applies to decisions of "the courts of appeals," whether this Court has appeal jurisdiction depends on whether TECA is such a court. Although TECA's status is thus crucial to its position, the State makes no effort to show that TECA is a "court of appeals" within the meaning of that section, other than a bare assertion that "TECA . . . is of course denominated a 'Court of Appeals.'" Juris. St. at 3.

10. Incorporated by reference in the EPAA, 15 U.S.C. § 754(a).

Contrary to the State's construction of § 1254(2), "courts of appeals," when used in Title 28 of the United States Code, describes only the circuit courts of appeals created by 28 U.S.C. § 43 for each of the twelve judicial circuits established by 28 U.S.C. § 41. It does not refer to other specialized federal courts, like TECA, which are given limited appellate jurisdiction over cases arising out of particular subject areas.[11] In fact, ESA § 211(b)(1), rather than constituting TECA a "court of appeals," grants it, with one exception, only "the powers of a circuit court of appeals with respect to the jurisdiction conferred upon it." The State's construction would render that grant of authority superfluous. Indeed, since Congress directed this Court to review TECA's decisions "in *the same manner as* a judgment of a United States Court of Appeals," ESA § 211(g) (emphasis added), *only after a petition for a writ of certiorari has been filed*, it obviously did not consider TECA a court of appeals for purposes of § 1254(2).

Although the State was well aware of appellees' position, Juris. St. at 1, it offers no affirmative basis for concluding that 28 U.S.C. § 1254(2) applies to TECA decisions. Its only attempt is the naked assertion that "[i]t is logical to conclude that Congress intended that, except to the extent it provided otherwise, the provisions for Supreme Court review would apply to TECA decisions in the same manner as to decisions of the other courts of appeals." *Id.* at 2. That conclusion is, of course, directly contrary to the strict

11. Congress granted TECA "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the EPAA and ESA] or under regulations or orders issued thereunder." By contrast, the circuit courts of appeals created by 28 U.S.C. § 43 are, *inter alia*, given "jurisdiction of appeals from [all final decisions] of the district courts of the United States . . . except where direct review may be had in the Supreme Court," and other non-final decisions of those courts, 28 U.S.C. § 1292, with venue for those appeals specified by 28 U.S.C. § 1294. If, as the State contends, TECA were a "court of appeals" within the meaning of Title 28, it too would have jurisdiction pursuant to 28 U.S.C. §§ 1291-1292, something Congress did not intend when establishing that court.

construction this Court has always given to congressional grants of jurisdiction. *Ex parte McCardle, supra.* It is also "at odds with the historic congressional policy of minimizing the mandatory docket of [the] Court in the interest of sound judicial administration." *MTM, Inc. v. Baxley,* 420 U.S. 799, 804 (1975); *accord, Key v. Doyle,* 434 U.S. 59, 65 (1977). Finally, it substantially impairs achievement of one of Congress' goals in constituting TECA a national appellate court—prompt resolution of cases involving national economic and energy policy.[12] Thus, the State's position is not advanced by its contention that "the policy behind § 1254(2) is equally applicable whether the decision against the state law is made by TECA . . . or by one of the circuit courts of appeals," Juris. St. at 3, when Congress has clearly not seen fit to authorize review by appeal.[13]

The State seeks to use its contrary view of Congress' "logic" to defeat the congressional intent manifested in ESA § 211(g). That position should be rejected and the State's appeal dismissed.

II

WHETHER THE STATE PROCEEDS BY APPEAL OR BY PETITION FOR WRIT OF CERTIORARI, FURTHER REVIEW BY THIS COURT IS UNWARRANTED

Anticipating appellees' motion to dismiss, the State requests the Court to treat the Jurisdictional Statement as a petition for writ of certiorari under 28 U.S.C. § 2103 if its appeal is dismissed. The State argues that "the policy that a state statute should not be finally nullified without Supreme Court review still has force," Juris. St. at 3, and should result in the Court issuing a writ to review TECA's

12. *See Bray v. United States,* 423 U.S. 73, 74 (1975).

13. It is noteworthy that in *Fry v. United States,* 421 U.S. 542, 548 (1975), where this Court affirmed a decision of TECA enjoining Ohio officials from paying, pursuant to an Ohio statute, salaries which were in excess of those authorized by the federal Pay Board on the ground that "under the Supremacy Clause the State must yield to the federal mandate," TECA's decision was reviewed by certiorari, not appeal.

decision. There is, however, no such policy, since this Court has often denied certiorari in cases where state or local regulations have been found preempted.[14] Even if there were such a policy, it would be irrelevant since, irrespective of the appropriate mode of review, there is nothing in this case which warrants further consideration by this Court.[15] Appellees thus submit that if the Court determines that it has jurisdiction to review TECA's decision by appeal, it should grant the motion to affirm. If the Court determines that it only has jurisdiction to review TECA's decision by writ of certiorari, the State's petition for that writ should be denied.

A. The Jurisdictional Issue

1. *This Court Has Already Declined To Review The Question Of The District Court's Jurisdiction; Since That Question Was Not Decided By TECA, It Is Not Now Properly Before The Court*

After the Second Circuit's decision, the State petitioned this Court to review the question whether the district court

14. *See, e.g., Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978), *cert. denied*, 441 U.S. 904 (1979); *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973); *Lopez v. Vowell*, 471 F.2d 690 (5th Cir.), *cert. denied*, 411 U.S. 939 (1973); *Armour and Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973); *Woolfolk v. Brown*, 456 F.2d 652 (4th Cir.), *cert. denied*, 409 U.S. 885 (1972); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

15. Even when review is by appeal the Court frequently affirms, without argument or opinion, decisions holding state statutes preempted. *See, e.g., Conference of Fed. Sav. & Loan Ass'ns v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 921 (1980); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd mem.*, 434 U.S. 898 (1977); *C.D.R. Enterprises v. Board of Educ.*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd mem.*, 429 U.S. 1031 (1977); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.*, 413 U.S. 902 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *Lewis v. Campbell*, 425 F.2d 77 (5th Cir. 1970), *aff'd mem.*, 401 U.S. 985 (1971).

was divested of jurisdiction by 28 U.S.C. § 1341. At the same time, the State prosecuted its appeal to TECA, challenging the merits of the district court's preemption ruling but not its jurisdiction to make that ruling. TECA was never asked to adjudicate the jurisdictional issue. Shortly after TECA's decision was rendered, this Court declined to review the Second Circuit's jurisdictional ruling. Since this is an appeal from a judgment of TECA, or alternatively a petition for a writ of certiorari to review that judgment, it follows that there is nothing for this Court to review insofar as the Tax Injunction Act is concerned. The court that decided that jurisdictional question was the Second Circuit, not TECA, and the State has already availed itself of the opportunity to seek review of that question by this Court. In reality, therefore, the State is again seeking review of the Second Circuit's decision.[16]

By pressing its jurisdictional attack despite the prior denial of certiorari, the State is attempting to circumvent Rule 51.2 of this Court. Review of the denial of a petition for a writ of certiorari is properly sought by a petition for rehearing pursuant to Rule 51.2. It may not be sought through a second petition or a request in an unrelated jurisdictional statement as the State has done here. The reason for the State's failure to follow proper procedure is apparent. Under Rule 51.2, a rehearing petition "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." The State, however, has advanced no arguments other than those made in its first petition.[17]

16. The State makes no bones about the fact that it is challenging the "Second Circuit's decision" with respect to 28 U.S.C. § 1341. Juris. St. at 16.

17. Even rehearing petitions which comply with the rule are generally granted only in extreme circumstances. *See, e.g., Zap v. United States*, 330 U.S. 800 (1947) (rehearing justified by new and controlling Supreme Court decision); *Brady v. Terminal R. R. Ass'n.*, 302 U.S. 678 (1937) (rehearing granted when reason for denial of certiorari was obvious jurisdictional defect that was cured in the interim); *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n.1 (1929) (grant of rehearing

Without strict adherence to the policy of the rule, the Court would be inundated with petitions rearguing the worthiness of particular cases for certiorari.

Even if the Jurisdictional Statement did comply with the Court's rules, the issue of the district court's jurisdiction is not one which may be reviewed by appeal. It does not involve a state statute which has been declared invalid as repugnant to the federal constitution or statutes issued thereunder as required by 28 U.S.C. § 1254(2). The decision of the Second Circuit is only that the Tax Injunction Act does not bar appellees' challenge to the anti-pass-through provision. The Court commonly separates certiorari issues from appeal issues within a single case.[18] In this case that has already been done by virtue of the State's petition for certiorari from the Second Circuit's § 1341 ruling. That petition having been denied, there should be no further review.

2. *The § 1341 Issue Was Correctly Decided Under Circumstances Which are Unlikely to Recur*

The Second Circuit's jurisdictional decision involves neither a significant nor a recurring issue. Whether the Tax Injunction Act applies when a state ties the validity of a price regulation to a tax provision has absolutely no significance beyond the narrow confines of this case. The State has cited no other instance in which a state has legislated linkage of this kind and appellees are aware of none. Nor does the State offer a reason for supposing that

because of new and conflicting decision by another circuit court). A petition, such as the State's here, which does not comply and does not certify compliance "shall be rejected by the Clerk." Sup. Ct. R. 51.2.

18. *See, e.g., Mishkin v. New York*, 383 U.S. 502, 512-15 (1966) (Court noted jurisdiction as to appealable issues but declined to decide issues for which certiorari was appropriate); *Holding v. Blankenship*, 387 U.S. 94 (1967) (Court noted jurisdiction as to single question presented by decision below and, citing 28 U.S.C. § 2103, considered the second issue in the jurisdictional statement as if presented in a petition for a writ of certiorari, which it denied).

any other state will adopt such a measure in the future. There is therefore no reasonable prospect that the § 1341 issue presented by this case is likely to recur. Indeed, Connecticut — the only other state which has attempted to prohibit oil companies from increasing petroleum product prices to recoup the cost of a gross receipts tax — expressly provided that the tax would continue in effect even if the attempt at price control were declared invalid. *See Mobil Oil Corp.* v. *Dubno,* 639 F.2d 919, 922 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3954 (June 23, 1981).

In any event, the district court and the Second Circuit were eminently correct in rejecting the State's argument that 28 U.S.C. § 1341 divested the district court of jurisdiction. By its very terms, that section strips a federal district court of jurisdiction *only* when it is asked to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" and there is "a plain, speedy and efficient remedy" in the state courts. Here, as the Second Circuit pointedly observed, quoting a statement made below by appellant Tully, appellees sought no such relief because they "do not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." In other words, the anti-passthrough provision "is all that the court enjoined." A. 27a. As the Second Circuit further pointed out, it is no answer to say that by virtue of the self-destruct aspect of the legislation, the tax will fall if the anti-passthrough provision is invalidated, since this was the "calculated decision" of the legislature itself. *Id.*

In the final analysis, the Second Circuit was plainly correct when it rejected the State's argument that the anti-passthrough provision was a "rule of tax incidence" which could not be enjoined by a federal court under § 1341. It is not necessary to decide whether the State has a right to place the "legal incidence" of the tax on oil companies to conclude, as did the Second Circuit, that it is "an entirely

different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product." A. 26a.[19] The short of the matter is that the legislative objective in enacting the anti-passthrough provision was "certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." A. 26a. This action is not insulated from federal scrutiny by 28 U.S.C. § 1341.[20]

3. *The Tax Injunction Act Is Also Inapplicable Because the Federal Courts Have Exclusive Jurisdiction Over the Preemption Claim*

Even were appellees' challenge to the anti-passthrough provision an action to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law,"

19. The State's reliance on *First Agricultural Bank* v. *Tax Comm'n*, 392 U.S. 339, 347-48 (1968), Juris. St. at 13, is totally misplaced. As the Second Circuit correctly observed, "[i]t is difficult to understand how the State can reasonably construe [that decision] to be helpful here. There was no Section 1341 issue in that case at all — the appeal was not from a district court but a state court." A. 26a.

20. The State's reliance on *Mandel* v. *Hutchinson*, 336 F. Supp. 772 (C.D. Cal. 1971), *aff'd*, 494 F.2d 364 (9th Cir. 1974), and *Czajkowski* v. *Illinois*, 460 F. Supp. 1265 (N.D. Ill. 1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978), is wholly misplaced. *Mandel* involved a challenge to a state property tax exemption to *resident* veterans by a *non-resident* veteran who sought to restrain the assessor from denying the exemption to *any* veteran. *Czajkowski* involved an attempt by plaintiffs to enjoin the state from expending funds to enforce a tax against them, relief which the court held was the equivalent of an injunction against the tax itself. Thus both cases involved challenges to a state's authority to tax, not the question whether the state could constitutionally regulate a taxpayer's ability to raise its prices to pay a tax.

The State's argument that § 1341 precludes federal courts from "interfering by injunction with state taxation," Juris. St. at 16, proves too much. If that were correct, the federal courts would have no jurisdiction over any matters affecting state taxation, and that is clearly not the case. *See Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976); *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966); *Wells* v. *Malloy*, 510 F.2d 74 (2d Cir. 1975). After all, that section bars federal jurisdiction only when an action attempts "to enjoin, suspend or restrain the assessment, levy or collection" of a state tax. The State's argument is particularly inapposite here, where the only claimed effect on state taxation is self-inflicted by virtue of the non-severability clause.

the Tax Injunction Act would be inapplicable because there is no "plain, speedy and efficient remedy" in state court. ESA § 211(a) provides that "[t]he district courts of the United States shall have *exclusive* original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder." *Id.* (emphasis added).[21] The decisions of this Court have firmly established that, for the purposes of federal jurisdictional statutes, preemption claims arise under the federal statute claimed to have preemptive effect. *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965); *see also American Federation of Labor v. Watson*, 327 U.S. 582 (1946). Since appellees' preemption claim arises under the EPAA, there can be no state court remedy.[22] This, then, is an added reason why the Tax Injunction Act does not stand as a barrier to federal jurisdiction here.

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21. In a manner parallel to § 211(a), ESA § 211(b)(2) vests TECA with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the EPAA and ESA]." In partially granting appellees' motion to dismiss the State's appeal, the Second Circuit held that their preemption claim arose under the EPAA because the relevant preemption analysis "necessitates 'a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder' . . . to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy." A. 21a (citations omitted). Thus the court held that the State's appeal of the district court's preemption decision properly belonged in TECA.

22. The State makes no substantive argument concerning the district court's exclusive jurisdiction pursuant to ESA § 211(a). Rather, it seeks to overcome that section by referring to five state court cases in which some of the appellees have allegedly challenged state laws as being preempted by the EPAA. Although the State's characterization of the two of those actions which were brought in New York courts challenging the additional franchise tax imposed by N.Y. Tax Law § 182(1) is patently inaccurate, there is no need to discuss those cases. No jurisdictional issue was raised or decided in those cases and, as this Court has long held, the posture of the litigants is irrelevant to whether a federal court has subject matter jurisdiction. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

B. The Preemption Issue

1. *The Lower Courts Correctly Applied Preemption Principles In Holding The Anti-Passthrough Provision Invalid*

Pursuant to the Supremacy Clause of the United States Constitution, a valid federal statute preempts any state statute which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 49 U.S.L.W. 4232, 4233 (March 9, 1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977). Such a conflict most clearly exists when the state statute frustrates an affirmative federal regulation.[23] It also exists though, when the "failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the [federal] statute." *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at 178, *quoting Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). [24] Applying these established

23. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962) (state statute which conflicted with federal statute in such a way that it was impossible to comply with both, held preempted); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (state law in area where Congress has regulated so extensively that any state law frustrates Congress' objectives held preempted); *Jones v. Rath Packing Co., supra* (state statute which applied a more stringent standard than federal standard held preempted because it frustrated articulated congressional policy).

24. Similarly, when Congress or its delegate weighs competing policy considerations and embodies the balance struck in a federal statute or regulation, states are not free to upset that balance. *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra* (state private damage suit which would provide more stringent standards than Interstate Commerce Comission, which had approved particular abandonment in question, held preempted); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1153-54 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (federal statute delegating federal agency responsibility to balance objective of industrial progress with health and safety standards preempted state statute which attempted to impose more stringent standard).

principles, the courts below properly found that the anti-passthrough provision conflicted with and was preempted by the EPAA and its regulations, standing, as it does, as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The district court found that the anti-passthrough provision conflicts with the EPAA and federal regulations as it applies to both exempt and non-exempt products.

With respect to products then subject to controls, the district court concluded:

> By precluding the passthrough . . . the anti-passthrough provision conflicts with the articulated policy allowing the passthrough, and the more general Congressional intent that prices for petroleum products "be set . . . pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government."

A. 59a (citation omitted). The court further pointed out that:

> While the federal policy supports "equitable distribution," and "equitable prices" among "all regions and areas of the United States," New York is seeking to insulate its citizens from increased costs resulting from a local tax while allowing the burden of the tax to fall upon the shoulders of non-New Yorkers.

A. 60a (citation and footnote omitted).[25]

With respect to products then exempt from controls, the district court recognized that under the EPAA

25. The district court further recognized that the anti-passthrough provision also thwarts the DOE policy of "allowing local taxes to be passed through solely to consumers within the taxing jurisdiction," *citing Mobil Petroleum Co.*, 5 DOE ¶ 81,188 (1980), discussed *supra* at 5-6 n.7. A. 60a-61a.

> exempting a product from the price control regulations, rather than constituting an end to federal regulation over those products, represents an affirmative administrative determination that "no such regulation is appropriate . . . pursuant to the policy of the statute."

A. 64a-65a, *quoting Ray v. Atlantic Richfield Co., supra; accord, Mobil Oil Corp. v. Dubno,* 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part,* 639 F.2d 919 (2d Cir.), *cert. denied,* 49 U.S.L.W. 3954 (1981). It thus held that "the anti-passthrough provision . . . 'frustrates the full effectiveness' of the present Federal regulatory policy under the EPAA in several ways," A. 65a, and declared it invalid.[26]

Since the remaining controls had been lifted by President Reagan on January 28, 1981, TECA did not need to analyze separately the anti-passthrough provision's impact on controlled and decontrolled products. Instead, it followed the two-step analysis established by this Court[27] and held that the anti-passthrough provision was preempted. Construing the federal statute, it recognized that "[t]he EPAA and the regulations form a framework for federal control of price and allocation of petroleum prices," A. 6a, which it concluded was still in place because of the President's standby authority to impose regulations. With respect to the state statute, it characterized "[t]he anti-passthrough provision [as] clearly a price control measure in exercise of the State's police power," A. 7a, because its stated purpose is "to prevent 'further increases in the price of petroleum products to consumers'; and to prevent the tax

26. The conflict created by the State's imposition of controls on products which the federal government had determined should be free of controls was obvious. The district court also found that the anti-passthrough provision conflicted with the objectives, such as equitable distribution at equitable prices, which the federal regulators were required to consider when exempting products. *Id.* at 65a-66a.

27. "Making [a preemption] determination 'is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' " *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra,* 49 U.S.L.W. at 4233, *quoting Perez v. Campbell,* 402 U.S. 637, 644 (1971).

from 'fueling inflation by prohibiting pass through of such tax to the consumers of this State.'" *Id.* It thus agreed with the Second Circuit's conclusion that "[t]his objective is certainly not an exercise of a taxing power but a police power affecting the price structure of petroleum products." *Id.* TECA concluded that the federal controls were imposed to assure equitable distribution of oil products at equitable prices, an objective which requires "a fair balance between seller and buyer, and between geographical areas." A. 8a. It therefore held that, by upsetting the balance struck by the federal government, the anti-passthrough provision conflicted with the EPAA, the price regulations and the goals of the federal program and was thus preempted.

2. *The State Presents No Argument Which Is Worthy of Review*

Although any review of TECA's decision would focus on whether that court correctly found conflict, that is not what the State asks this Court to decide. Instead, it advances a number of only tangentially relevant arguments which either are foreclosed by the decisions of this Court or provide an insufficient basis for further review.

a. The EPAA's Express Preemption Provision Does Not Limit The Application Of The Supremacy Clause To State Price Regulations

The State argues that TECA did not accord proper significance to § 6(b) of the EPAA, 15 U.S.C. § 755(b), which provides that any state regulation in conflict with the EPAA regulations and orders is preempted. According to the State, that section demonstrates Congress' recognition "that some state laws bearing on petroleum prices would not be 'in conflict with' regulations or orders issued under EPAA" and further, says the State, "[c]onsistently applied, [TECA's] opinion would invalidate any state law

relating to petroleum prices." Juris. St. at 20. That argument is nothing more than a reiteration of the contention, made and rejected below, that Congress, by enacting an express preemption provision, foreclosed all other forms of preemption. The argument, of course, is irrelevant because a conflict *is* present here and thus there is express preemption within the meaning of § 6(b). Beyond that, the argument is also plainly inconsistent with the Court's decision in *Jones v. Rath Packing Co.*, *supra*, where it held that a determination that a state law was not expressly preempted did not "resolve [the] case, for we still must determine whether the state law [is preempted because it] 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " 430 U.S. at 540-41.

Here, as elsewhere, the State seeks to portray TECA's decision as worthy of further review by vastly overstating the scope of TECA's holding. Even though, as the State contends, there may be state laws *affecting* petroleum product prices which are not preempted, the anti-passthrough provision, by directly *regulating* petroleum product prices, actually conflicts with the EPAA and the federal regulations and is preempted whether that preemption is pursuant to § 6(b) or other preemption principles. That is all TECA held.

The State also suggests that, because § 6(b) provides only that state regulations which conflict with federal regulations and orders are expressly preempted, it is inappropriate to analyze the statutory objectives which those regulations must further in determining whether preemption exists. That argument too is beside the point, since both lower courts concluded that the anti-passthrough provision conflicts with the regulations and other official acts of the President's delegates, not just with the EPAA and its objectives.[28] More importantly though, the argument is

28. The State's reliance on *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981), is thus misplaced. There plaintiffs could not or did not point to any federal statute, regulation, or decision

simply inconsistent with the preemption analysis mandated by this Court. Under the State's theory, the purposes of the federal act and regulations would be irrelevant to the preemptive effect of the EPAA, and Congress' objectives would have no bearing on the determination whether there was conflict between the federal and state enactments. This Court, however, has always looked to Congress' objectives to resolve preemption questions even when the state law is in conflict with a federal regulation. *See, e.g., Ray v. Atlantic Richfield Co., supra.* In essence, the State is advancing the illogical proposition that, by enacting §6(b), an express preemption provision, Congress intended to give the EPAA less preemptive effect than a statute without such a provision. That argument is unsound and forms no basis for abandoning the preemption analysis approved by the Court in *Jones v. Rath Packing Co., supra.*

b. The State May Not Undermine The Decision To Deregulate Petroleum Product Prices By Attacking Congress' Logic

The State also asks the Court to review the decisions below because they are supposedly "based . . . on a perception that the revocation of federal regulations pursuant to EPCA represented a legislative decision that, so long as standby authority existed, petroleum products be free of all laws that may have any effect on price." Juris. St. at 23. The State does not base its contrary perception on statutory provisions or legislative history, for such a challenge to TECA's construction of the statute would collide with Congress' clear language. Congress intended, as it stated, to effect "a gradual return to an unregulated market," S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* [1975]

with which severance taxes, such as the one there at issue, were in conflict. Instead they relied exclusively on the general objectives of various federal statutes and programs. Unlike that severance tax, the anti-passthrough provision conflicts with specific, operative federal regulations and orders and, by doing so, thoroughly frustrates accomplishment of Congress' objectives.

U.S. CODE CONG. & AD. NEWS 1956, 2045, not one regulated by the states. Since the State cannot argue on the basis of Congress' intent, it is relegated to challenging its logic.

The fact of the matter, however, is that in 1975 Congress decided to counteract growing OPEC power by removing arbitrary price controls which deterred both domestic production and energy conservation in favor of a free market system as the means to achieve the nine EPAA policy objectives. Rather than achieve this result immediately, Congress required the President to decontrol products gradually, but only after making detailed findings and following specified procedures. Congress' decision, manifested in the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975), and the decisions of the President and his delegates exempting particular products are determinations that, consistent with the policy of the federal statute, *no regulation* is appropriate. *Ray v. Atlantic Richfield Co., supra.* The anti-passthrough provision, a price regulation, directly conflicts with that decision. *See Brookhaven Cable TV, Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979).

As far as the wisdom of Congress' logic is concerned, the State's view is simply irrelevant since, as Judge Blumenfeld recognized when adjudicating the invalidity of the Connecticut anti-passthrough provision:

> It is within neither [the] Court's realm nor its competence to evaluate the wisdom of federal energy policy, nor the economic theories that underlie it. . . . [I]nasmuch as [the anti-passthrough provision] contravenes federal policy by attempting to regulate the price that may be charged in Connecticut . . ., that provision cannot stand.

Mobil Oil Corp. v. Dubno, supra, 492 F. Supp. at 1014-15. *Cf. Steadman v. Securities and Exchange Commission,* 49 U.S.L.W. 4174, 4175 n.10 (February 25, 1981) (where issue

is Congress' intent, "[i]t is not for this Court to determine the wisdom of Congress' prescription"); *Great A&P Tea Co. v. F.T.C.*, 440 U.S. 69, 99 (1979) ("Court is not in a position to review the economic wisdom of Congress.")

c. The State Improperly Relies on Labels, Disregarding the Federal Law's Structure, Purpose and Effect

The State no longer denies that the federal regulations expressly authorized full recovery of all franchise tax increases and that it seeks to prevent the operation of that rule. Instead, the State argues that the district court and TECA erred by concluding that the anti-passthrough provision was preempted as it applied to formerly controlled products because, in the State's view, those regulations only created a duty not to charge more than the maximum lawful price and were not intended to preempt state "rules of tax incidence." Juris. St. at 26. For purposes of determining whether preemption exists, the State's arguments are irrelevant.

In assessing whether a state law conflicts with federal regulations setting a ceiling price or any other federal maximum, the analysis does not begin and end, as does the State's, with the *ipse dixit* that a maximum only establishes a level which may not be exceeded and below which the states may regulate.[29] Rather, as this Court has consistently held, the purposes and objectives of the federal provision must be examined to determine if the state law frustrates their achievement. That was exactly the course the Court followed in *Ray v. Atlantic Richfield Co., supra,* where it held that a federal provision for maximum tanker

29. The State's argument that preemption here turns on whether refiners have a "right" to charge maximum prices in derogation of state law is classic circumlocution. Refiners obviously may charge a price prohibited by a state law if the state enactment is preempted. Conversely, they have no such "right" if the state law is not preempted. Whether preemption, and hence such a "right", exists turns on whether the state law impedes federal objectives. Here it plainly does.

size preempted a state regulation establishing a more stringent requirement. The courts below were obliged to adopt a similar approach here and correctly concluded that the same result was dictated. Nor is preemption dependent on whether Congress manifested a specific intent to preempt state "rules of tax incidence." Conflict is assessed by focusing on "the nature of the activities which the States have sought to regulate, rather than the method of regulation adopted." *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., supra,* 49 U.S.L.W. at 4233, *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

The nature of the activity which the State has attempted to regulate with the anti-passthrough provision is petroleum product pricing and, in doing so, it has interfered with and substantially frustrated the federal scheme for determining how increased tax costs are allocated. That interference is precisely what the Supremacy Clause prohibits. *Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981), involved a similar attempt by the State of Louisiana to insulate its citizens from the cost of its First-Use Tax on natural gas by regulating the allocation of that tax cost. At the urging of plaintiffs, including the State of New York, represented by appellant Abrams, the Court held that tax was preempted by the federal Natural Gas Act:

> By specifying that the First-Use Tax is a processing cost to be either borne by the pipeline or other owner without compensation, an unlikely event in light of the large sums involved, or passed on to purchasers, Louisiana has attempted a *substantial usurpation of the authority of the [federal agency] by dictating to the pipelines the allocation of processing costs for the interstate shipment of natural gas.*

Id. at 4569 (emphasis added). Since "the State may not trespass on the authority of the federal agency," the Court

held the First-Use Tax was invalid under the Supremacy Clause. The same result should obtain here.

It is also no answer for the State to label the anti-pass-through provision a rule of tax incidence. This Court ten years ago rejected "the aberrational doctrine . . . that state law may frustrate the operation of federal law so long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). By attaching significance to the label "rule of tax incidence," the State asks the Court to revive the very aberrational doctrine it rejected ten years ago, even though the Court has since reaffirmed that implied preemption is compelled by the federal statute's "structure and purpose," not the state's. *Jones v. Rath Packing Co., supra,* 430 U.S. at 525.

d. The Preemptive Effect Of The EPAA And Price Regulations Is Not Diminished By Two Letters Written By DOE Employees

Finally, the State attempts to invoke the jurisdiction of this Court to overturn the unanimous opinion of TECA, a specialized panel with highly developed expertise in energy cases, and the lengthy and well-reasoned opinion of the district court, based on nothing more than two short unauthoritative letters written by DOE lawyers. The State no longer argues, as it did below, that those letters are legally conclusive, apparently recognizing that under the DOE's own regulations and the standards established by this Court in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), they "merely provide general information," 10 C.F.R.§ 205.80, and are entitled to "little weight." It now bases its case on the position that "the primary importance of the DOE letter is not as a ruling of law but as a compelling demonstration that DOE did not believe the New York statute would obstruct the program crafted by its regulations and deregulatory amendments." Juris. St. at 21.

The distinction the State now seeks to draw between a legal analysis and some other form of advice is totally specious and, in this instance, factually inaccurate. What the State requested, according to Eric J. Fygi, author of one of the letters, was an "opinion as to whether aspects of Assembly Bill No. 10609 would be contrary to the [EPAA] or the regulations promulgated by [the DOE]." A. 103a. The author's opinion was clearly directed to a "legal question," not a policy matter, and he expressly said so:

> [T]his view of the *legal question* on which you have requested our advice *is not intended to intimate any view of the merits, as a matter of policy,* of State statutes intended to impose additional taxes on petroleum refining and marketing activities occurring within the respective States.

A. 104a (emphasis added).

The Fygi letter attempts only to analyze the anti-pass-through provision and, as the lower courts found, nothing about it or the letter from former DOE General Counsel Lynn Coleman concerning the Connecticut provision gives them "power to persuade." *Skidmore* v. *Swift & Co., supra.* Both letters reflect a lack of thoroughness. Mr. Fygi's barebones two-sentence opinion, without analysis or citation of authority, was dashed off the same day it was requested. He himself admitted that "the time within which I was advised you required a response to this question *did not permit the exhaustive analysis of the question you posed.*" A. 104a. Although Mr. Coleman took somewhat longer to respond, his letter reflects no analysis of the issue whatsoever.

Moreover, the reasoning of both is invalid. Mr. Fygi adopted the conclusion of Saul Heckelman, the New York Tax Commission's Special Counsel, *see* Appendix, who applied only the physical impossibility conflict test, not the alternative "stands as an obstacle" standard as required by this Court in *Ray v. Atlantic Richfield Co., supra,* 435 U.S. at

158. Mr. Coleman adopted no standard whatsoever. His conclusion that "the Federal regulations supersede State law only where there is legal conflict between them," A. 108a, is simply a tautology. He did not state what he understood by "legal conflict," much less explain why he believed the Connecticut provision presented no such conflict. He did not consider the New York provision at all.

Since both letters are entitled to little weight and are inconsistent with DOE's more authoritative regulations and orders,[30] they offer a wholly insufficient basis on which to invoke this Court's jurisdiction to review the decisions below.

30. 10 C.F.R. §§ 205.80-.86; *Mobil Petroleum Co.*, 5 DOE ¶ 81,188 (1980); *Union Oil Co.*, 5 DOE ¶ 81,342 (1980); *Union Oil Co.*, 2 DOE ¶ 80,174 (1978); *Texaco Inc.*, DOE Case No. BEE-1246 (Aug. 22, 1980), *finalized*, 6 DOE ¶ 81,382 (1980); *Amerada Hess Corp.*, DOE Case No. BEE-1310 (Sept. 24, 1980), *finalized*, 7 DOE ¶ 81,068 (1980).

CONCLUSION

For the foregoing reasons, appellees respectfully request that the State's appeal be dismissed or, in the alternative, that the decision of TECA be affirmed without further review. If the State's appeal is dismissed and its Jurisdictional Statement treated as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, appellees submit that it should be denied.

Respectfully submitted,

August 14, 1981

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APPENDIX

June 10, 1980, Opinion of S. Heckelman relied upon in letter of Eric J. Fygi, June 10, 1980

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
ALBANY, N.Y. 12227

June 10, 1980

The Honorable Richard A. Brown
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Judge Brown:

You have requested an opinion as to whether the anti-pass on provision in Assembly Bill No. 10609 which would impose a gross receipts tax on oil companies is legal. In my opinion, the anti-pass on provision is legal. The Emergency Petroleum Allocation Act of 1973 (hereinafter EPAA) (P.L. 93-159), as amended by the Energy Policy and Conservation Act (P.L. 94-163), directs the President to promulgate regulations concerning allocation and pricing of crude oil, residual fuel oil and each refined petroleum product (15 USCS §753(a)). The EPAA provides that the pricing regulation shall provide for a dollar for dollar pass through of both net increases and decreases in the product cost of petroleum produced (15 USCS §§753(b)(2) and 758).

Under the pricing regulations, a refiner may not charge a price which exceeds the maximum price as computed under the regulations. The two most important elements in the pricing formula are increased costs of crude oil and increased non-product costs. Federal, state and local taxes are non-product costs. The taxes which may be included in computing the maximum allowable price, i.e., which may be passed on, are "federal, state, and local property, excise, franchise and other similar taxes." The regulation also provides that increased "federal, state and local income

taxes are not includible in" the computation of the maximum allowable price, i.e., may not be passed on (10 CFR 212.83(c)(2)(iii)(E)(7)(i)). A franchise tax measured by gross receipts like the one which would be imposed by the enactment of A. 10609 would either be characterized as an excise tax or a franchise tax and, therefore, under the refiner regulations, the proposed tax would be one of the non-product cost increases which may be passed through in an oil company's price for petroleum (Mobil Petroleum Company, Inc., Decision and Order dated March 6, 1980; cf. Ruling 1974-4 Federal Energy Guidelines Par. 16,014 (1974)).

With respect to Federal preemption, section 6(b) of the EPAA provides as follows:

> "The regulation under section 4 [15 USCS §753] and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order." (15 USCS §755(b))

While the specific reference to preemption in the provision set forth above does not refer to Federal pricing regulations, the phrase in the provision "any program for the allocation of" certain oil and petroleum products can be interpreted to include the Federal pricing regulations since those regulations are an integral part of allocation (see 1973 U.S. Code Congressional and Administrative News 2589). However, since an oil company could comply with the proposed anti-pass on provision as well as the Federal pricing regulations, the anti-pass on provision in A. 10609 is not prohibited by the preemption provision of the EPAA.

The petroleum pricing regulations do not require a company to charge the maximum allowable price. The regulations only permit a company to charge the maximum

allowable price. Therefore, a state could prohibit the inclusion of a gross receipts tax in the computation of the price of petroleum.

The Federal government, in my opinion, has not foreclosed all state legislation in the petroleum pricing area. Nothing in the EPAA indicates that Congress intended to foreclose state legislation in this area. In fact, state regulation of the allocation of petroleum which does not conflict with the Federal law or regulations has been upheld by the Maryland Court of Appeals (*Governor of Maryland v. Exxon Corp.*, 279 Md 410, 370 A2d 1102).

In addition, it should be stressed that there are many forms of petroleum as to which there is no question of Federal preemption at all. Pricing of many petroleum products has either never been covered by the Federal pricing regulations or has been decontrolled. These include: aviation gasoline, kerosene, No. 1 heating oil, residual fuel oil, newly discovered fuel oil and heavy crude oil. In addition, the Federal price controls on petroleum products will expire on September 30, 1981 (15 USCS §760g).

It should also be noted that states may fix prices by state action without violating the Sherman Act as long as there is continuing active supervision of such price fixing. (*Parker v. Brown*, 317 U.S. 341 (1943); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, U.S. 63 L ed 2d 233 (1980)).

Very truly yours,

s/ SAUL HECKELMAN

Saul Heckelman
Special Counsel

SH:lm

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No. 81-96

IN THE

Supreme Court of the United States

October Term, 1981

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Defendants-Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

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Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT RESPONSE TO THE COURT'S REQUEST OF OCTOBER 13, 1981

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Plaintiff-Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

PLAINTIFFS-APPELLEES' JOINT RESPONSE TO THE COURT'S OCTOBER 13, 1981 REQUEST

On June 10, 1981 the Temporary Emergency Court of Appeals ("TECA") affirmed the District Court's judgment that the anti-passthrough provision found in New York Tax Laws, § 182(12)(a), was preempted by the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. §§ 751-760 ("EPAA"), and the regulations promulgated thereunder. Apdx. 1a-10a. In the final paragraph of its June 10 opinion TECA stated:

> "[w]hen the statute expires in September 1981, it will signal the end of federal concern in this area." Apdx. 10a.

TECA had noted that the Energy Policy and Conservation Act ("EPCA")[1] "expires by its terms on September 30, 1981," citing 15 U.S.C. § 760g. That provision, which is Section 18 of the EPAA as amended by Section 461 of the EPCA, provides in relevant part as follows:

> The authority to promulgate and amend any regulation or to issue any order under this chapter [the EPAA] shall expire at midnight September 30, 1981, but *such expiration shall not affect any action or pending proceedings, administrative, civil or criminal, not finally determined on such date, nor any administrative, civil or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date. Id.* (emphasis added)[2]

On October 13, 1981, the Court, by Alexander L. Stevas, Clerk, requested the parties "to address whether the expiration referred to by the TECA will moot this case, affect the jurisdiction of this Court to review the judgment of the

1. Pub. L. No. 94-163, 89 Stat. 955.

2. The EPCA's provision for the expiration of EPAA price control authority had no effect upon provisions of the EPCA which were unrelated to the EPAA. Thus, the EPCA did not expire on September 30, 1981.

TECA, or otherwise bear on whether the Court should undertake plenary review of that judgment." For the reasons stated below, it is appellees' position that 15 U.S.C. § 760g neither moots this case nor divests this Court of jurisdiction to review TECA's judgment. On the other hand, expiration of the President's authority to promulgate petroleum pricing regulations under the EPAA provides another reason—in addition to those set forth in our Motion to Dismiss or Affirm—why this Court should not undertake plenary review.

ARGUMENT

Appellants and appellees are in apparent agreement that 15 U.S.C. § 760g neither moots this case nor divests this Court of jurisdiction to review TECA's judgment—although appellees submit that no substantial legal questions warranting plenary review are present here.

First, Congress expressly provided in § 760g that the expiration of Presidential price control authority "shall not affect any action or pending proceedings . . . not finally determined on such date." Thus, this Court has not been divested of jurisdiction by virtue of the expiration of Presidential price control authority over petroleum products.

Nor has that expiration mooted this case. As the Court pointed out in *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974), "[t]he starting point for analysis [of mootness questions] is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " That is not so here.

The District Court's judgment, affirmed by TECA, granted appellees dual relief: (1) a declaratory judgment that the anti-passthrough provision was invalid and unenforceable because it was preempted by the EPAA and the regulations promulgated by the President and his delegates pursuant to EPAA authority; and (2) an injunction against

the provision's future enforcement. Assuming *arguendo* that the expiration of the President's EPAA authority has eliminated the basis for an injunction against enforcement for the present period—because, arguably, there is not now a present preemptive conflict between the anti-passthrough provision and federal law—that expiration has *not* eliminated the basis for the District Court's declaration of invalidity.[3] Such a preemptive conflict existed at least until October 1, 1981. That declaration most definitely "affect[s] the rights of litigants" before this Court, since it determines appellees' right to pass through any and all tax liability which has accrued under the New York statute from January 1, 1980 through September 30, 1981. The State has admitted as much in its Jurisdictional Statement (pp. 10-11), and it took the same position in its TECA brief (p. 50). Accordingly, this case is not moot. *See Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 122 (1974).[4]

Moreover, the ultimate result in this action should have a direct effect on appellees' liability for taxes. Certain appellees contend in pending state court actions that one consequence of the preemption of the anti-passthrough provision is that the New York tax was inoperative.[5] While appellants dispute that claim, they recognize that the ultimate outcome in this case will directly affect those pending actions and the substantial rights of the parties, at least until September 30, 1981. Jurisdictional Statement at 12. *See Bank of Marin* v. *England,* 385 U.S. 99, 100-101 (1966).

3. Even under that assumption, the District Court's injunction barring enforcement of the anti-passthrough provision for the period prior to October 1, 1981, remains necessary.

4. In addition, because appellees' complaints alleged alternative grounds having nothing to do with preemption for striking down the anti-passthrough provision, which neither the District Court nor TECA found it necessary to reach (*e.g.* due process, commerce clause and equal protection claims), this case cannot be deemed moot. *See Powell* v. *McCormack,* 395 U.S. 486 (1969).

5. Of course, as the Second Circuit held, the "calculated decision" of New York to link its ability to collect the tax to the continued validity of the anti-passthrough provision does not bring this case within 28 U.S.C. § 1341. *See* Motion to Dismiss or Affirm at 15-17.

While a mere financial dispute—albeit one involving millions of dollars—does not warrant plenary review, it cannot be said that the case is moot as between the parties.

CONCLUSION

At bottom, the only question now before the Court is this: Does this case warrant plenary review, as appellants contend; or, as appellees maintain, should the State's appeal be dismissed and certiorari denied or, alternatively, should TECA's judgment be affirmed without full briefing and argument. Assuming (without conceding) that there is no present preemptive conflict—and that the only remaining issue relates to accrued tax liability under the New York statute—there is even less reason than before for this Court to exercise its discretion in favor of plenary review.

Respectfully submitted,

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PLAINTIFFS-APPELLEES' JOINT APPENDIX TO THEIR MOTION TO DISMISS OR AFFIRM

PLAINTIFFS-APPELLEES' JOINT APPENDIX
TO THEIR MOTION TO DISMISS OR AFFIRM

LISTING PURSUANT TO SUPREME COURT
RULE 28.1

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AMERADA HESS CORPORATION

SUBSIDIARIES

Anglomar Shipping Company Ltd. (United Kingdom)
Bushehr Petroleum Co. (Iran)
Conmar Terminals, Ltd. (Canada)
D'Ippolito Oil Company (Delaware)
Esperanza Petroleum Corporation (Delaware)
First United Shipping Corp. (Liberia)
Interocean Tanker Corp. (Liberia)
Matco Tankers (U.K.) Ltd. (United Kingdom)
Meadville Corporation (New Jersey)
Minas y Petroleos del Ecuador (Ecuador)
Oasis Oil Company of Libya, Inc. (Delaware)
Ontario Terminals, Inc. (Pennsylvania)
Petroleos Yasuni, C.A. (Ecuador)
Reserve Terminal Corporation (New Jersey)
St. Croix Petrochemical Corp. (U.S. Virgin Islands)
Second Reserve Terminal Corp. (New Jersey)
Second United Shipping Corp. (Liberia)
Solar Gas, Inc. (Nevada)
South Jersey Terminal Corp. (New Jersey)
Third United Shipping Corp. (Liberia)
Wyatt, Inc. (Connecticut)

AFFILIATES

Ariadne Co., L.P. (Delaware)
Artemis Marine Co., L.P. (Delaware)
Atlas Marine Co. (New York)
Granreunion Co. (Liberia)

AMOCO OIL COMPANY

Analog Devices
Chicago Bank of Commerce
Cetus Corporation
Dearborn Park Corporation
Illinois Neighborhood Development Corporation
Solarex Corporation
Semix
Alberta Gas Trunk Line Company, Limited
Alberta Underground Storage, Limited
L.C.P. Operations, Limited
Pembalta Gas System No. 1, Limited
Pembalta Gas System No. 2, Limited
Pembalta Gas System No. 3, Limited
Pembalta Gas System No. 4, Limited
Pembalta Gas System No. 5, Limited
Pembalta Gas System No. 6, Limited
Pembalta Gas System No. 7, Limited
Pembalta Gas System No. 8, Limited
A/S Penkem
Amoco Fina, S.A.
China American Petrochemical Company, Limited
Rhodiaco Industrias Quimicas, Limitada
Samsung Petrochemical Company, Limited
Tereftalatos Mexacanos, S.A.
A.G. International Chemical Company, Inc.
Amoshore Drilling Company
Far East Bulk Carriers, Inc.
Intercontinental Quimica, S.A.
Singapore Petroleum Company Pte., Limited
Singapore Refining Co. Pte., Ltd.
Societa Oleodotto Tavazzano Trecate, S.p.A.
Mainline Pipeline, Limited
Cliffe Storage, Limited
Kharg Chemical Company, Limited
Mittelland Raffinerie, A.G. (The)
Petroleum Storage, Limited
Petrolera Curaray, S.A.
Gulf of Suez Petroleum Company

Rudeis Oil Company
Torsina Oil Company
Amoco Australia, Limited
Madras Fertilizers, Limited
Madras Refineries, Limited
Iran Pan American Oil Company
Stratford Transportation
AIMSA S.A. de C.V.
Amoco Exploration Ziare, S.P.R.L.
Fertilizers of Trinidad and Tobago, Limited
Ocean Minerals Company
Cymoly Corporation
Cyprus Anvil Mining Corporation, Ltd.
Pelly River Mines, Limited (N.P.L.)
Cyprus Metallurgical Processes Corporation
Cyprus Pima Mining Company
General Electric Company
Salmon River Scheelite Corporation
Madison Minerals, Inc.
Mount Wheeler Mines, Limited
Nihon Mistron Company, Limited
Rome Group, Incorporated
Sierra Talc De Mexico, S.A.
Sierra Monterey, S.A.
White Pigment Corporation
Minera Cuicuilco, S.A. de C.V.
Rio Blanco Oil Shale Company
ACM Services, Incorporated
Atlas Supply Company
Farmers Fertilizer Company
Chicap Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
West Shore Pipe Line Company
Wyco Pipe Line Company
Abbott Pipe and Supply
FM-4 Gila River Corporation
Indecorp, Inc.
Redman Pipe and Supply Company
Canyon Reef Carriers, Incorporated
East Texas Salt Water Disposal Company

Gravcap, Incorporated
Sultran, Limited

ATLANTIC RICHFIELD COMPANY

Alyeska Pipeline Service Company
Anaconda-Ericcson Inc.
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Flower Street Limited
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Co.
Montoro, Empresa Para La Industria Quimica
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
Ontario Terminals Inc.
Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company

CHEVRON U.S.A., INC.

Standard Oil Company of California
AMAX Inc.
American Overseas Petroleum Limited
Pars Investment Corporation
Chevron Oil Company (Nigeria)

Cetus Corporation
Irving Oil Company, Limited
Irving Oil Limited
Eastern Oil and Service Stations Ltd.
Irving Oil Limited
Aditivos Mexicanos, S.A.
Cansulex Limited
Chevron Chemical S.A.
BP-California Limited
Chevron Chemical Company S.A.F.
Chevron Quimica do Brasil Ltda.
Asfaltos Chevron S.A.
Chevron Oil Europe (Services), Inc.
Coromandel Fertilisers Limited
Insecticidas Ortho, S.A.
Karonite Chemical Company, Limited
Nippon Petroleum Detergent Company, Limited
Orobis Limited
Orogil, S.A.
Societe Calgil
Petrosynthese, S.A.
Quimicas Ortho de California, Limitada
Chevron do Brasil Participacoes e Empreendimentos Ltda.
C-W Properties, Inc.
Glenwood Properties
Arabian American Oil Company
Calpam B.V.
Calpam Luxembourg S.A.R.L.
Caltex Mediterranean Limited
Caltex Deutschland G.m.b.H.
Hydrantenbetriebsgesellschaft Deutscher Kraftverkehr Ernst Grimmke G.m.b.H.
Nord-West Kavernengesellschaft G.m.b.H.
Rhein-Main-Rohrleitungstransport G.m.b.H.
Aircraft Fuel Supply B.V.
Calpam Vloeibaar Gas B.V.
City Parkeergarage (City Parking) B.V.
Deventer Ijssportcentrum N.V.
Maasvlakte Olie Terminal N.V.

Rotterdam-Antwerpen Pipleiding
(Nederland) B.V.
A/S Hydrantanlaegget Koebenhavns
Lufthavn, Kastrup
Provestenens Dampforayning Nord A/S
Chevron Oil Europe (Services), Inc.
DE.BA.-Deposito di Bari - S.p.A.
MARS-Milan Airport Refuelling Service
S.p.A.
Raffineria di Roma S.p.A.
Seram - S.p.A.
VECAL - Veneta Carburanti Lubrificanti
S.p.A.
Chevron Oil Sales Company
Chevron Oil Europe (Services), Inc.
BP-California (Grangemouth) Limited
Hertfordshire Oil Storage Limited
Hydrant Servicing Company Limited
United Kingdom Oil Pipelines Limited
Warwickshire Oil Storage Limited
Saraco S.A.
UBAG - Unterflurbetankungsanlage
Flughafen Zurich
Chevron Transport Corporation
N.V. Rotterdam-Rijn Pijpleiding
Maatschappij
Combugaz
Petroleum Products Storage and Transport
Company, Societe Anonyme
Societe Belge de Transport par Pipeline
Societe Anonyme
Rotterdam-Antwerpen Pijpleiding (Belgie)
N.V.
Societa per Azioni Raffineria Padana Olii
Minerali SARPOM
The Associated Octel Company Limited
A.K. Chemie G.m.b.H. & Co. K.G.
(a partnership)
Associated Octel Co. (South Africa)
(Proprietary) Limited
Societa Italiana Additivi per Carburanti
(S.I.A.C.)

Societe Octel-Kihlmann
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad
Chevron Oil Company of Portugal
S.A. Escuela Bella Vista
Shale Oil Syndicate, Inc.
Rimbey Pipe Line Co., Ltd.
Sultran Ltd.
Chevron Transport Corporation
Oleoducto del Zulia, S.A.
Atlas Supply Company
Canyon Reef Carriers, Inc.
Compania Comercial Chevron S.A. (Inactive)
Felix Oil Company
Kenai Pipe Line Company
Kentucky Agricultural Energy Corporation
Long Beach Oil Development Company
Plantation Pipe Line Company
Societe de Manutention de Carburants Aviation de Tahiti
Standard Pacific Gas Line Inc.
Compania Comercial Conchan S.A. (Inactive)
Compania de Niquel Colombiano, S.A.
Compania de Petroleo Chevron S.A.
Cornwallis Arctic Oils Limited
Crest Exploration Limited
Freeport Bunkering Co. Limited (Inactive)
Freeport Trading Co. Limited
Marine Agents & Brokers Limited
Nepco Towing Company Limited
First Colony Life Insurance Company
Huntington Beach Company
Iranian Oil Participants Ltd.
Iranian Oil Services (Holdings) Ltd.
P.T. Caltex Pacific Indonesia
Refineria Petrolera de Guatemala-California, Inc.
Caltex Petroleum Corporation
Australian Lubricating Oil Refinery Limited
Boral Limited
Boral Basic Industries Limited

Petrochemical Holdings Limited
Petroleum & Chemical Corp. (Aust.)
Limited
Queensland Oil Refineries, Pty., Limited
Botany Bay Tanker Company (Australia)
Pty. Limited, The
Changi Airport Fuel Hydrant Installation
Pte. Limited
Phoenicia Oil Company S.A.L.
New Zealand Refining Company Ltd., The
The Texas Company (New Zealand) Limited
(Inactive)
South Africa Oil Refinery (Pty) Limited
Ndola Oil Storage Company, Limited
Honam Oil Refinery Company, Limited
Korea Tanker Company, Limited
Batangas Land Company, Inc.
Central African Petroleum Refineries
(Private) Limited
Singapore Refining Company Private Limited
East African Oil Refineries Limited
Singapore Refining Company Private
Limited
Koa Oil Company, Limited
Nippon Oil Staging Terminal Company,
Limited
Tokyo Tanker Company, Limited
Ampol Petroleum Limited
Australian Lubricating Oil Refinery
Limited
H.C. Sleigh Limited
Australian Lubricating Oil Ref. Limited
Botany Bay Tanker Company (Australia)
Pty. Limited, The
Mediterranean Refining Company
Nippon Petroleum Refining Company,
Limited
Pakistan Refinery Limited
Philippine Petroleum Corporation
Societe Reunionnaise Dientreposage
West Australia Petroleum Pty. Limited

EXXON CORPORATION

None

GULF OIL CORPORATION

A/S Jargul
A/S Jargul and Co. K/S
AB Djurgardsberg
Adela Investment Company, S.A.
Albert Rose Chemicals, Ltd.
Allied-General Nuclear Services
Andogas, S.A.
Asia Polymer Corporation
Autobahn-Raststaette Wuerenlos Ag.
Aviation Fueling Services
Bio Research Center Company, Limited
Britama Tankers Limited
Burgan Pension Fund Trustees Limited
China Gulf Oil Company Limited
China Gulf Plastics Corporation
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Compagnie D'Investissement Bustibles
de Reacteurs a Haute Tp.
"Condor" Industria Quimica, S.A.
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Eastern Venezuela Gas Transport Company
Ethyleen Pijpleiding Maatschappij
(Belgium) S.A.
Ethyleen Pijpleiding Maatschappij
(Nederland) B.V.
Explorer Pipeline Company
General Atomic Company
Gulf Canada Limited
Gulf Canada Products Limited
Gulf Canada Resources, Inc.
Gulf Oil Zaire S.A.R.L.
Harshaw-Murata Kabushika Kaisha
Harshaw-Juarez S.A. de C.V.

Harshaw Galvanotecnia S.A.
Harshaw Quimica Ltda.
Hochtemperatur Reaktorbau GMBH
Industrias Vencedor S.A.
Interquimica S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Kuwait Oil Company Trustees Limited
Laurel Pipe Line Company
London Oil Refining Company Limited
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
Mozambique Gulf Oil Company
Oil Shippers Services, Inc.
Oklahoma Nitrogen Company
Paloma Pipeline Company
Pembroke Capital Company
Pembroke Cracking Company
Petrosil Oil Company Limited
Plastigama, S.A.
Platte Pipe Line Company
Pol Transport AB
Polyquimicos, S.A.
Raffinerie De Cressier S.A.
Resinas Andinas S.A.
Rio Blanco Oil Shale Partnership
SARNI S.p.A.
Societe de Combustible Pour Reacteurs
a Haute Temperature (Corhat)
Solvent Refined Coal International, Inc.
Sunrise International Company, Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemical Company, Ltd.
Taiwan Plasticizer Corporation
Taiwan VCM Industries Corp.
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

MOBIL OIL CORPORATION

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian Petroleum Supply Company (S.A.), The
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Associated Octel Company, Limited, The
ATAS - Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anonim Sirketi
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bayerische Mineral-Industrie A.G.

Belix
Belridge Oil Company
Benoil S.A.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Services S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celulosa y Papel de Colombia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chicago Rotoprint Company
Colombianos Distribuidores de Combustibles, S.A.
Colonial Pipeline Company
Combustibles Colmerauer
Comet-Brennstoffdienst GmbH
Comex-Seal Limited
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petrolierrs-C.O.R.E. Dis.
Compagnie Rhenane de Raaffinage
Compagnie Senegalaise de Lubrifiants (C.S.L.)

Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Companis Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Transalpine Oelleitung GmbH
Dixie Pipeline Company
Drivmedelscentralen AB
Sukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Legergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Faavang Autoverksted A/S
FACEL
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.

Frome-Broken Hill Company Proprietary Limited
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Gesellschaft fur Unweltschutz und Beseitigung von Ol-und chemischen Abfallen Gesellschaft mbH
Ghana Bunkering Services Limited
G.I.E. des Societes Mobil de l'Afrique de L'Quest
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Inc.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hotell och Restaurant AB Mobilen Kommanditbolag
Hotell och Restaurant Aktiebolaget Mobilen
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
Kanto Oil Pipeline Co., Ltd.
Keiyo Sea-Berth Company, Limited

Kettleman North Dome Association
Kobe Port Service Kabushiki Kaisha
Kosmogas (Hellas) Industrial and Commercial Company S.A.
Kygnus Ekika Gas Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Supermarches De Cote D'Ivoire
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Ami, S.A.
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Exploration Gabon Inc.
Mobil Gaz-Mobil Petrol Gaslari Anonim Sirketi
Mobil Korea Lube Oil Industries
Mobil Motor Rest AG
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)

Mobil Oil (Switzerland)
Mobil Oil Tchad
Mobil Oil Togo
Mobil Oil Turk Anonim Sirketi
Mobilrex
Mobil Tyco Solar Energy Corporation
Molinos de Carton y Papel, S.A.
M.O.R.E.M.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
Nichimo Sekiyu Seisei Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding
Maatschappij
Occidental de Empaques, Ltda.
Octel Associates
Oldenburgische Erdoel Gesellschaft mit
beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P. T. Arun Natural Gas Liquefaction
Company
P. T. Stanvac Indonesia
Pars Investment Corporation
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia)
Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.

Qatar Petroleum Company Limited
Qualbank, Inc.
Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roc Lubricants Limited
Rohoel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S.A. Mas & Cie
Sanwa Kasei Kogyo Kabushiki Kaisha
Sarni S.p.A.
Saudi Can Company, Ltd., The
Saudi Maritime Company Ltd.
Schubert Kommanditgesellschaft
S.C.I. Du fonds Du Val
Seal Participants (Holdings) Limited
Segher de Mexico, S.A. de C.V.
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Camerounaise d'Entreposage (S.C.E.)
Societe Camerounaise de Depots Petroliers (S.C.D.P.)
Societe Civile de Mustapha
Societe Civile d'Etudes de l'Alimentation en Eau de la Region Industrielle de Port Jerome

Societe Civile Immobiliere
Courcelles-Etoile
Societe Civile Immobiliere de Construction
du 34 Avenue du General Leclerc a
Boissy-St-Leger
Societe Civile Immobiliere de Construction
"La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la
Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine
Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de
Produits Petroliers
Societe d'Armement Fluvial et Maritime
"SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine
(SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants
Aviation (S.M.C.A.)
Societe de Manutention de Carburants
Aviation Dakar-Yoff
Societe de Manutention de Carburants
Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour
Le Enterprises (Meple)
Societe de Renovation D'Emballages
Metalliques (Rem)
Societe d'Entreposage de Bobo-Dioulasso
(S.E.B.)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere de la
Seine Maritime
Societe de Renovation d'Emballages
Metalliques
Societe des bitumes et Cut-Backs du
Cameroun
Societe des Etablissements Goux

Societe Des Huiles Lemahieu
Societe du Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Bagonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Toulouse-Distribution Produits Petroliers
T. R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha

Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich
Gesellschaft m.b.H.
Twifo Oil Plantations Ltd.
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
VOSACEC, S.P.A.
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb
G.m.b.H.
West Shore Pipe Line Company
Western Petroleum Products Limited
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

NEW ENGLAND PETROLEUM CORPORATION

NEPCO, Inc.
The Charter Company

TEXACO INC.

UNITED STATES

Badger Pipe Line Company
Colonial Pipeline Company
Coltexo Corporation
Explorer Pipeline Company
Jefferson Chemical Company, Inc.
Kaw Pipe Line Company
Laurel Pipe Line Company
LOOP Inc.
Olympic Pipeline Company
Texaco-Cities Service Pipe Line Company
Texaco Development Corporation
Texaco Financial Services Inc.
Texaco International Trader Inc.

Texaco Ventures Inc.
Texas-New Mexico Pipe Line Company
Texas-U.S. Chemical Company
The Texas Pipe Line Company
THUMS Long Beach Company
Whitney Supply Company
Wolverine Pipe Line Company
Wyco Pipe Line Company

CANADA

Texaco Canada Inc. and subsidiaries
Texaco Chemicals Canada, Ltd.

LATIN AMERICA

Heddington Insurance Limited
Lubricantes y Tambores del Ecuador, C.A.
Panama Exploration Inc.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Societe Antillaise des Petroles Texaco
Societe Anonyme de le Raffinerie des Antilles
Texaco Antilles Limited
Texaco Bahamas Limited
Texaco Belize Limited
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Chile S.A.C.
Texaco Guatemala Inc.
Texaco Interamerica Exploration Company
Texaco Mexicana, S.A.
Texaco Oil Company
Texaco Panama Inc.
Texaco Paraguay Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.
Texaco Trinidad, Inc.
Texaco Uraguay Sociedad Anonima

Texaco West Indies Limited
Texas Petroleum Company
The Pipeline of Puerto Rico, Inc.

EUROPE

Caltex Deutschland GmbH
Caltex Oil S.A.E.
Caltex (Kalteks) Petrol A.S.
Deutsche Texaco A.G. and subsidiaries
Irish Refining Company Ltd.
Mainline Pipelines Ltd.
Norsk Texaco Oil A/S
N.V. Rotterdam Rijn Pijpleiding
Maatschappij
OMW Oberrheinische Mineralolweke GmbH
Pembroke Cracking Company
Rhein-Main Rohrleitung-
transportgesellschaft
Skandinaviska Raffinaderi Aktiebolaget
Sconraff
Societa per Azioni Raffineri Padana
Olii Minerali
s.a. Texaco Belgium n.v.
Texaco A.G.
Texaco Austria Gesellschaft m.b.H.
Texaco Canarias S.A.
Texaco Denmark Inc.
Texaco France S.A.
Texaco Germany Petroleum Inc.
Texaco Greek Petroleum Company S.A.
Texaco A/S
Texaco International Financial Corporation
Texaco (Ireland) Limited
Texaco Limited and subsidiaries
Texaco Luxembourg S.A.
Texaco Malta Inc.
Texaco Netherlands Inc.
Texaco North Sea Norway A/S

Texaco Oil Aktiebolag
Texaco Olie Maatschappij B.V.
Texaco Overseas Tankship Limited
Texaco Portuguesa de Petroleos, Lda.
Texaco Services (Europe) Ltd.
Texaco S.p.A.
Texaco (Spain) Inc.
Transalpine Pipeline
United Kingdom Oil Pipelines, Ltd.

MIDDLE EAST, FAR EAST, AFRICA

Arabian American Oil Company
Mitsui-Texaco Chemicals Company, Ltd.
P.T. Caltex Pacific Indonesia
Societe Malienne des Petroles Texaco
Texaco Africa Ltd.
Texaco Angola-Prospeccao e Producao S.A.R.L.
Texaco Cote d'Ivoire
Texaco Egypt Inc.
Texaco Ghana Limited
Texaco Gabon
Texaco Haute Volta
Texaco Hong Kong Limited
Texaco Indonesia Corporation
Texaco Jambi Inc.
Texaco Japan Inc.
Texaco Korea Inc.
Texaco Marine Investments Ltd.
Texaco Maroc
Texaco Natuna Inc.
Texaco Nauka Inc.
Texaco Niger Inc.
Texaco Nigeria Limited
Texaco Orient Petroleum Company
Texaco Overseas (Nigeria) Petroleum Company
Texaco Overseas Petroleum Company
Texaco Saudia Inc.
Texaco Zaire Inc.

Texaco Overseas Petroleum Company
Texaco Saudia Inc.
Texaco Zaire Inc.

UNITED REFINING COMPANY

Coral Petroleum, Inc.

No. 81-96

Office-Supreme Court, U
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, CHEVRON U.S.A. INC., AMOCO OIL COMPANY, TEXACO INC. and EXXON CORPORATION,

Appellees.

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LAROCCA, Commissioner of the New York State Energy Office,

Appellants,

—against—

AMERADA HESS CORPORATION,

Appellee.

JAMES H. TULLY, JR., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Appellants,

—against—

NEW ENGLAND PETROLEUM CORPORATION,

Appellee.

ON APPEAL FROM THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

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JAMES H. TULLY, JR., et al.,

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ON APPEAL FROM THE TEMPORARY
EMERGENCY COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Several of the propositions advanced by appellees require response. Before responding, however, we note that nowhere in Appellees' Joint Motion to Dismiss or Affirm do they take issue with our assertion that, if the decision below is left unreviewed, its consequences will be severe for New York, its public transportation facilities, and its consumers.

A. Jurisdiction of This Court on Appeal

Appellees misread the Congressional intent behind ESA § 211(g). Clearly, the intent was to provide for prompt review of TECA decisions, not to foreclose appropriate means of review.* As appellees point out, Jt. M. at 11,** ESA § 211(g) provides that, if a petition for certiorari is filed within 30 days of the TECA judgment, this Court should review TECA decisions "in the same manner as" decisions of the circuit courts of appeals "as provided in section 1254 of title 18." But § 1254 does not prescribe any procedures for review by certiorari; it merely provides that certiorari is available at any time. Thus, if Congress had wished to provide for review of TECA decisions only by certiorari, it would have had no need to refer to 28 U.S.C. § 1254, which would add nothing to ESA § 211(g).

Rather, Congress incorporated § 1254 (not merely subsection 1, which refers to certiorari) because it sets forth the circumstances in which each type of review of a "court of appeals" decision is appropriate. A timely jurisdictional statement, which is in the alternative a petition for certiorari, Juris. St. at 3, must therefore trigger § 211(g) in the same way as does a

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* We note that if § 211(g) limits review of TECA decisions to certiorari as appellees assert, then 28 U.S.C. § 1252, which provides for appeals to the Supreme Court from decisions by "any court of the United States" in a civil proceeding holding an Act of Congress unconstitutional, would be inapplicable. There can be no reasonable contention, however, that this appeal statute does not apply to TECA.

** "Jt. M.," "Juris. St.," and "Apdx." refer respectively to the appellees' Joint Motion, the appellants' Jurisdictional Statement, and the Appendix to the Jurisdictional Statement.

petition that is not also a jurisdictional statement; § 1254 then prescribes the appropriate type of review.*

Thus, even under the oil companies' view that TECA should not be deemed a "court of appeals" within the meaning of § 1254(2), this Court has appellate jurisdiction by virtue of the incorporation of § 1254 in ESA § 211(g). There is, moreover, no basis for the appellees' assertion, Jt. M. at 11,* that § 1254(2) does not apply of its own force to TECA decisions. First, § 1254 refers to the "courts of appeals" and TECA is a "court of appeals." Second, TECA functions in the same manner as the circuit courts of appeals. Third, if Congress intended to limit appellate jurisdiction under § 1254 to appeals from a *circuit* court of appeals, it would have amended the statute to so provide when it created TECA.**

In any event, the concern behind § 1254(2)—the gravity of invalidating a state statute—is no different whether the decision is made by TECA or by a circuit court of appeals. This should be a compelling consideration if the Court decides it has discretion to review the case. The policy and legislative history of § 1254(2) are not nullified by the fact that this Court has declined to hear a few cases, *see* Jt. M. at 13 n. 14, in which the litigants did not assert their right of appeal, but proceeded by way of certiorari.

B. The § 1341 Question

The oil companies assert that "there is nothing for this Court to review insofar as the Tax Injunction Act is concerned." Jt.

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* That certiorari may be available in this case, see Jt. M. at 12 n. 13, is of no consequence. *Any* case subject to appeal pursuant to § 1254(2) is also subject to review by certiorari pursuant to § 1254(1). Indeed, appellees cite numerous cases in which parties with an indisputable right of appeal chose to seek review by certiorari. Jt. M. at 13 N. 14.

** The oil companies argue that, if § 1254 applies to TECA, TECA would have jurisdiction pursuant to §§ 1291 & 1292. There is no basis for this conclusion: ERSA § 211(b)(2) clearly modifies §§ 1291 & 1292, shifting part of the jurisdiction of the circuit court of appeals to TECA. In any event, TECA would not have venue except over cases within its jurisdiction under ESA. *See* 28 U.S.C. § 1294.

M. at 14. The § 1341 question, however, is one of the subject matter jurisdiction of the federal courts; as such, it is always open to review by this Court, even on its own motion, and would be open even had the State not raised the issue before.* *E.g. Louisville & Nashville R.R.* v. *Motley*, 211 U.S. 149 (1908). We are not, therefore, "again seeking review of the Second Circuit's decision," Jt. M. at 14, and discussion of how we might have done so is beside the point. We are asking the Court, in reviewing the TECA judgment, to decide a question that is necessarily presented: Did the District Court have jurisdiction?

The oil companies assert that the § 1341 question presented in this case is unlikely to recur. Jt. M. at 15-16. This statement does not square with the apparent efforts by appellee Mobil Oil Corp. to tie a provision similar to New York's passthrough prohibition to a recently-enacted Pennsylvania gasoline tax, in the hopes that this would cause invalidation of the entire tax. Philadelphia Inquirer, June 21, 1981, p. E1.

The Tax Injunction Act question presented by this case is in fact a broad one: whether any state tax statute prescribing the ultimate incidence of the tax is beyond the scope of § 1341. As indicated in our Jurisdictional Statement, at 13, the States have passed many such tax statutes. If plenary consideration is granted, we will show that New York's passthrough provision is similar in this respect to the statutes we have already cited and to others, *e.g.*, N.Y. Tax L. § 1139(a); Tenants Property Tax Rebate Act, N.J.S.A. § 54:4-6.2 *et seq.*, that fix the incidence of state taxes and refunds.

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* In fact, the State has from the beginning of this litigation asserted the lack of District Court jurisdiction. As noted in our TECA brief, p. 12n, we continued to assert this point before TECA, but did not then press it; because of the unusual bifurcation of appellate jurisdiction over some EPAA issues, the Second Circuit had already decided the § 1341 issue at the Court of Appeals level, and it might have appeared obstructive to ask TECA to reconsider it. In raising the issue before the Supreme Court, we are pointing to a defect in the TECA judgment. Although the only Court of Appeals opinion on the question is by the Second Circuit, we are not now asking for review of its judgment.

We will also show that a provision doing so is a proper element of a tax statute. The oil companies offer no reason to challenge this fundamental fact, which *First Agricultural National Bank* v. *Tax Commission*, 392 U.S. 339, 347-48 (1968), puts beyond question; that *First Agricultural* and its progeny were not § 1341 cases has no bearing on the matter.

The oil companies also rely on the Second Circuit's holding that § 1341 does not apply because it was a "calculated decision" of the State to allow the tax to fall if the passthrough prohibition were held invalid. Jt. M. at 16. The State, however, made that decision because in its view the passthrough prohibition was an integral element of the tax statute. If the Legislature had been silent on the question of severability, a court enjoining the passthrough prohibition would in all likelihood, under ordinary tests of severability, have enjoined the continuing levy of the tax itself.* Clearly, the fact that the Legislature chose to make explicit the passthrough prohibition's inseparability from continuing accrual of the tax is a fact supporting—not, as the oil companies would have it, opposing—applicability of § 1341.**

As the Court has recently noted, "the reasons supporting federal non-interference ['with so important a local concern as the collection of taxes'] are just as compelling today as they

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* We do not imply that, in such a circumstance, a court could properly nullify previously-accrued liability. The Legislature made the issue moot in this case by explicitly providing that previously-accrued liability would not be affected by an injunction against the passthrough prohibition. Apdx. 100a.

** None of the Courts below have considered the oil companies' argument that § 1341 does not apply because federal jurisdiction is exclusive under the Economic Stabilization Act ("ESA"). That argument therefore provides no reason to deny plenary consideration of this case. If such consideration is granted, we will show that ESA gives the federal courts exclusive jurisdiction only over actions by a person "suffering legal wrong because of any act or practice arising out of this title." ESA § 210(a), Apdx. 71a. The oil companies claim that they have been injured by a New York law, not by an "act or practice arising out of" ESA or EPAA.

were in 1937," when the Tax Injunction Act was passed. *Rosewell* v. *LaSalle National Bank*, 101 S. Ct. 1221, 1234-1236 (1981). A federal injunction should not allow "state tax administration . . . [to] be thrown into disarray." *Id.* at 1236.

C. The Preemption Issue

The oil companies state that we do not ask this Court to decide "whether [TECA] correctly found conflict." Jt. M. at 22. Of course we do. Other assertions by appellees on the preemption issue similarly require brief response.

1. The oil companies rely heavily, Jt. M. at 20, as did the District Court and TECA, on the proposition that the burden of the tax would fall on non-New Yorkers, rather than be borne by the companies themselves (in the manner of an income tax). But, as we have pointed out, Juris. St. at 25, and will elaborate on plenary consideration, this proposition makes no economic sense. Furthermore, no factual evidence was taken by the courts in reaching this factual conclusion, which we have vigorously disputed, relying in part upon statements by the appellees themselves. *Id.**

2. Against the detailed outline we have presented of reasons showing that New York's passthrough prohibition is a rule of tax incidence, Juris. St. at 13-15, the appellees offer only language from legislative findings. Jt. M. at 21-22. This language, as we have already pointed out, Juris. St. at 15, is of no consequence. Significantly, the appellees do not attempt in this context to distinguish *First Agricultural National Bank*, *supra*, which clearly established that states may, as an integral part of their tax statutes, fix the ultimate economic incidence of a tax; the fact that *First Agricultural* was not a § 1341 case, irrelevant even to the § 1341 question, *see* p. 4 *supra*, is clearly of no avail to them on the preemption issue.

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* If another State believed its citizens were burdened by the New York law, it could bring an action challenging the law under this Court's original jurisdiction, *see Maryland* v. *Louisiana*, 101 S. Ct. 2114, 2124-25 (1981). No State has done so.

Contrary to the appellees' assertion, Jt.M. at 28, we do not contend that a State may frustrate federal law so long as it has some purpose other than frustration. We assert that, even if the federal petroleum price program was intended to override all state regulations of petroleum prices—an incorrect proposition, we believe—it certainly did not intend to preempt state laws that affect prices only by exercising the traditional state authority to fix the incidence of a state tax. It would require a compelling showing to demonstrate that, in enacting and later revoking a system of price regulations, the federal government silently decided to abandon its deep tradition, Juris. St. at 16, of non-interference with the state tax power. That showing is utterly absent here.

3. The oil companies fail, as did the District Court and TECA, to recognize the primary significance of EPAA § 6(b), 15 U.S.C. § 755(b). By preempting only state price regulations "in conflict with" the federal program, § 6(b) clearly indicates that Congress believed some state price regulations would be deemed *not* to conflict with that program, and so be preserved.* This poses a simple question: if New York's passthrough prohibition is deemed a price regulation and has been preempted by the federal program of price control and decontrol, what state price regulations were not preempted?**

The oil companies have never answered this question because, even under their view that the New York law is a price

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* The oil companies argue that § 6(b) does not provide the controlling standard because the courts must still determine whether the state law is an obstacle to the accomplishment of the federal purpose. This argument is untenable; the "obstacle" standard is part of the test of "conflict," *see, e.g., Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and so is included in the inquiry made under § 6(b). Section 6(b) indicates that some state price regulations will survive that inquiry.

** Under TECA's theory, not only price regulations but any law that made one state a less profitable marketplace than another would be preempted. Notwithstanding appellees' attempt to narrow the scope of this holding, Jt. M. at 23, the language and consequences of the TECA opinion are clear. Apdx. 8a; Juris. St. at 24-25.

regulation, it has less bearing on the federal program than any other state price regulation: at most, the state law prevents a company from charging the maximum price that the former federal regulations prevented it from exceeding, and it does so only by barring passthrough of one cost item, rather than by establishing a price level or a mechanism for determining prices. Juris. St. at 14-15.

4. We do not contend that Congress's purposes in enacting EPAA and EPCA were irrelevant to the administrative decision on whether or not to preempt state laws relating to petroleum prices. Cf. Jt. M. at 23-24. Given the broad delegation to the executive to craft the regulatory program, however, the decision on how broad the program's preemptive effect should be was completely that of the President and his delegate, now the Secretary of Energy. The courts should not substitute their own judgment as to whether the statutory objectives could best be achieved by preempting New York's law; their only function is to determine whether, to the requisite "high standard of certainty," the program actually adopted by DOE had that effect. Juris. St. at 7, 20-21.

In this connection, the oil companies distort our argument with respect to the DOE letters. Jt. M. at 28-30. We assert that DOE's responses are entitled to great deference in this case—even more than the nearly controlling weight usually accorded agencies' interpretations of their own regulations, *see* Juris. St. at 23—because the ultimate question is whether New York's law is an obstacle to the federal program of regulation and deregulation crafted by DOE and its predecessors.*

The oil companies assert that the Coleman letter—which was unqualified, composed without haste, and in response to an

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* As the appellees point out, Jt. M. at 29, DOE declared in its letter on the New York law that it was intimating no opinion on the merits, as a matter of policy, of state petroleum taxes. Apdx. 104a. Naturally, DOE would not offer an opinion on *state* tax policy. But DOE's letter, by finding no conflict with federal law, necessarily indicated that it perceived no obstacle to *federal* regulatory policy.

inquiry by Mobil—is entitled to little weight because its discussion is brief. But Mr. Coleman wrote enough to indicate that, at least so far as deregulated products are concerned, the question is a simple one: revocation of federal price regulations was not intended to preempt pre-existing state powers. That Mr. Coleman's explanation may have been "curt" is of no consequence. *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

In short, the courts, in deciding whether New York's law is an obstacle to the success of the program crafted by DOE and its predecessors, cannot disregard the two letters by DOE—the only DOE expressions on the subject— that indicate there is no such obstacle. Because TECA's decision contradicts the opinion of the administrative agency, the issue is plainly a substantial one calling for plenary review.

5. Contrary to the oil companies' declaration, Jt. M. at 24-25, we do not challenge the wisdom of Congress in ending federal regulation of petroleum prices. Rather, we challenge the oil companies' interpretation of Congressional intent—a far different matter. For the reasons summarized in our Jurisdictional Statement, at 23-24, we assert that it makes no sense to believe that Congress intended to eradicate long-estabished state powers, either indefinitely or subject to spontaneous regeneration on September 30, 1981. In calling for a "gradual return to an unregulated market," Congress's intention was the same as when it used similar language at the end of World War II: to end the extraordinary federal intervention in the marketplace, not to nullify state powers that existed before the federal price regulation was enacted.

6. With respect to the now-revoked federal regulations, the oil companies mischaracterize our position by declaring that "[t]he State no longer denies that the federal regulations expressly authorized full recovery of all franchise tax increases . . . ." Jt. M. at 26. The federal regulations authorized nothing of the sort; they merely established a mechanism for determining a price maximum and prohibited oil companies

from exceeding that maximum.* There is nothing in the federal scheme suggesting that its purpose would be obstructed by state statutes that prevent oil companies from charging the maximum price that federal law would allow. Given the opportunity to declare that such statutes would obstruct its program, DOE indicated precisely the contrary. It is impossible, therefore, to infer from the federal scheme a right to violate such statutes. Most particularly is this so in the case of a state statute that affects prices only by determining the incidence of a tax; the federal price regulations were drafted and interpreted with the intention of accommodating, not overriding, state law in this area. Juris St. at 26.

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* This fact renders inapposite *Maryland* v. *Louisiana*, 101 S.Ct. 2114, 2124-25 (1981), in which this Court invalidated a Louisiana tax on natural gas. Louisiana prohibited the gas owner from seeking any reimbursement of the tax from purchasers of the hydrocarbons extracted during processing. This provision, clearly designed to impose the tax burden on out-of-state purchasers of the gas, squarely conflicted with federal law because, as the Court noted, the federal regulatory agency "*insists* that the owners of liquefiable hydrocarbons bear a fair share of the expense associated with processing." *Id.* at 2130 (emphasis added). In the present case, the federal regulations did not insist on, or even authorize, passthrough of tax costs; they simply prohibited passthrough of certain costs and did not prevent passthrough of others.

CONCLUSION

For each of the reasons set forth above and in our Jurisdictional Statement, this Court should note probable jurisdiction, or in the alternative grant a writ of certiorari, to review the opinion and judgment of the court below.

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